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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 880.

WILLIAM H. HACKETT, FRANK W. HACKETT, AND ROBERT C. PIERCE, EXECUTORS OF THE LAST WILL AND TESTAMENT OF WILLIAM H. Y. HACKETT, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE CITY OF OTTAWA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 15, 1878.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Wednesday, the eighteenth day of September, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third.

WILLIAM H. BRADLEY,
Clerk.

WILLIAM H. HACKETT, FRANK W. HACKETT, AND ROBERT C. PIERCE, as executors of the last will and testament of WILLIAM H. Y. HACKETT, deceased,
vs.
THE CITY OF OTTAWA. } In assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be in remembered that on the fourteenth day of February, A. D. 1878, came William H. Y. Hackett, by Messrs. Scholes and Mather, and G. S. Eldredge, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district
2 aforesaid, his bond for costs and precipe for a writ of summons against said defendant in said entitled cause, which said bond and precipe are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit court, March term, A. D. 1878.

WILLIAM H. Y. HACKETT
vs.
THE CITY OF OTTAWA. } In assumpsit.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, we hereby agree and stipulate that execution may issue against our property for any costs taken against him. Dated this 14th day of February, A. D. 1878.

SCHOLES & MATHER.

(Endorsed.) Filed February 14th, A. D. 1878.

3 WILLIAM H. BRADLEY,
Clerk.

Precipe.

CIRCUIT COURT UNITED STATES OF AMERICA, *United States of America*, } *ss:*

March term, A. D. 1878.

WILLIAM H. Y. HACKETT *vs.* THE CITY OF OTTAWA, } In assumpsit. Damages $6,000.

The clerk will issue summons in the above entitled cause, directed to the marshal of said district, returnable as above.

SCHOLES AND MATHER AND
G. S. ELDREDGE,
Plaintiff's Attorneys.

(Endorsed.) Filed February 14, A. D. 1878.
WM. H. BRADLEY,
Clerk.

And on the same day, to wit: the 14th day of February, A. D. 1878, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, with the marshal's return annexed thereto, is in the words and figures following, to wit:

4 *Writ of Summons.*

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the Marshal of the northern district of Illinois, greeting:

We command you to summon The City of Ottawa, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto William H. Y. Hackett of a plea of trespass on the case upon promises, to his damage, as he alleges, of six thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, chief justice of the supreme court of the United States of America, at Chicago aforesaid, this 14th day of February, in the [SEAL.] year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 102d year.

5 WM. H. BRADLEY,
Clerk.

Special Deputy's Return.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents, that I have appointed, and by these presents do appoint, E. L. Waterman, my true and lawful deputy, to execute the annexed writ, William H. Y. Hackett *vs.* City of Ottawa, and to make return of the execution thereof according to law.

JESSE S. HILDRUP, [SEAL.]
United States Marshal for the Northern District of Illinois.

I have served this writ upon the City of Ottawa, herein named, by delivering a true and correct copy thereof to Samuel Richelson, mayor of said City of Ottawa, on the 16th day of February, A. D. 1878.

JESSE S. HILDRUP,
United States Marshal.

By E. L. WATERMAN,
Special Deputy.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

6 E. L. Waterman, being duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return, and that the expense returned by him in addition to the fee was actually incurred, and that the same is according to law.

E. L. WATERMAN.

Subscribed and sworn to before me this 18th day of February, A. 1878.

JAMES H. PADDOCK,
[SEAL.] *Notary Public.*

(Endorsed): Filed Feb. 22, A. D. 1878.
WM. H. BRADLEY, *Clerk.*

And on the same day, to wit, the 22d day of February, A. D. 1878, said plaintiff, by his attorneys, filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In Circuit Court, March Term, A. D. 1878.

7 William H. Y. Hackett, who is a citizen of the State of New Hampshire, the plaintiff, by G. S. Eldredge, and

Scholes and Mather, his attorneys, complains of the City of Ottawa, a body corporate and politic, organized and existing under the laws of the State of Illinois, a citizen thereof, and situate in said northern district, the defendant, of a plea of trespass on the case on promises, for that whereas heretofore, to wit, on the second day of August, A. D. eighteen hundred and sixty-nine, as to wit: Said Northern District, said defendant, made, executed and delivered to one W. H. W. Cushman its one hundred and twenty certain bonds or written obligations for five hundred dollars each, bearing date the day and year last aforesaid, one-third due in five, one-third in ten, and one-third in fifteen years from date, and numbered from one to one hundred and twenty inclusive, each of them signed by Henry A. Schuler, the then mayor of said city, and also signed by R. N. Waterman, the then clerk of said city, and attested by the seal of said city, in and by each of

8 which said bonds said defendant acknowledged itself indebted to and promised to pay the said W. H. W. Cushman, or bearer, the sum of five hundred dollars, lawful money of the United States of America, at the St. Nicholas National Bank of the City of New York, with interest at the rate of ten per cent. per annum, payable annually at said bank on presentation of the several coupons thereto annexed, as they should respectively become due, and which said one hundred and twenty bonds, except with respect to the time of payment thereof, were in substance the same, a copy of one of which said bonds, to wit, No. 42, is hereto attached, and made a part of this declaration. Marked Exhibit "A."

And plaintiff alleges that defendant did at, &c., on, &c., last aforesaid, execute and deliver to the said W. H. W. Cushman ten interest coupons attached to each of said bonds, numbered to correspond therewith, for fifty dollars each, as representing the annual interest at the rate of ten per cent. per annum, to thereafter become due upon said bonds. Plaintiff avers that each of

9 said coupons was signed by the said Henry A. Shuler, mayor, and countersigned by the said R. N. Waterman, clerk of said city; and that in and by each of said coupons defendant promised to pay bearer at the maturity thereof fifty dollars, at the St. Nicholas National Bank, in the city of New York, as one year's interest upon the bond referred to by number therein.

Plaintiff further avers that each of said bonds contains the following recital, to wit: "This is one of one hundred and twenty bonds of like amount and even date herewith, numbered one to one hundred and twenty respectively, issued by the city of Ottawa, by virtue of the charter of said city, wherein it is provided that the city council shall have power to borrow money on the credit of the city and to issue bonds therefor, and pledge the

revenue of the city for the payment thereof, provided that no sum or sums of money shall be borrowed at a greater interest than at ten per cent. per annum." (Article 5, sec. 3.)

"No money shall be borrowed by the city council until the ordinance, passed therefor, shall be submitted to and voted
10 for by a majority of the voters of said city attending an election for that purpose. (Article 10, section 20.)

And also in accordance with a certain ordinance passed by the city council of said city, on the 15th day of June, A. D. 1869, entitled an ordinance to provide for a wall for municipal purposes, which ordinance was ratified by a majority of all the qualified voters of said city, at an election holden on the 20th day of July, A. D. 1869, and in conformity with an ordinance passed by the city council of said city, on the 30th day of Jr' [illegible] 1869, entitled an ordinance to carry into effect the ordinan[illegible] June 15th, 1869, entitled an ordinance to provide for a [illegible] municipal purposes."

"And plaintiff further avers that he did on, to wit: [illegible] day of August, A. D. 1870, at, to wit: New York city, become the purchaser for a valuable consideration, and owner of a portion of said one hundred and twenty bonds, to wit: Bonds numbers forty-one to sixty-one, both inclusive, for value, before due, in the usual course of business, without notice of any
11 defences thereto. Plaintiff further avers that he did on, &c., at, &c., last aforesaid, also become the purchaser and owner of one hundred interest coupons belonging to said bonds, last aforesaid, for value, before due, in the usual course of business, without notice of any defences thereto, and that he is still the owner and bearer thereof, whereby defendant became liable to pay plaintiff the several sums of money in said coupons mentioned, when the same should respectively become due. And plaintiff avers that defendant being so liable as aforesaid, did on, to wit: the said first day of August, A. D. 1870, at, to wit: said northern district, promise plaintiff to pay him said several sums of money in said bonds and coupons mentioned, when the same should thereafter respectively become due. And plaintiff further avers that he did, when said coupons thereafter respectively became due, present the same for payment, and demand payment thereof at, to wit: the St. Nicholas National Bank, of New York city, but plaintiff avers payment thereof was refused. Plaintiff further avers that all of said one hundred coupons
12 were long past due before the bringing of this suit, and that defendant had neglected and refused to pay the same or any part thereof although often requested so to do at, to wit: said northern district.

Nevertheless the said defendant (although often requested, etc., to wit: on the day when the said coupons became due and pay-

Scholes and Mather, his attorneys, complains of the City of Ottawa, a body corporate and politic, organized and existing under the laws of the State of Illinois, a citizen thereof, and situate in said northern district, the defendant, of a plea of trespass on the case on promises, for that whereas heretofore, to wit, on the second day of August, A. D. eighteen hundred and sixty-nine, as to wit: Said Northern District, said defendant, made, executed and delivered to one W. H. W. Cushman its one hundred and twenty certain bonds or written obligations for five hundred dollars each, bearing date the day and year last aforesaid, one-third due in five, one-third in ten, and one-third in fifteen years from date, and numbered from one to one hundred and twenty inclusive, each of them signed by Henry A. Schuler, the then mayor of said city, and also signed by R. N. Waterman, the then clerk of said city, and attested by the seal of said city, in and by each of which said bonds said defendant acknowledged itself
8 indebted to and promised to pay the said W. H. W. Cushman, or bearer, the sum of five hundred dollars, lawful money of the United States of America, at the St. Nicholas National Bank of the City of New York, with interest at the rate of ten per cent. per annum, payable annually at said bank on presentation of the several coupons thereto annexed, as they should respectively become due, and which said one hundred and twenty bonds, except with respect to the time of payment thereof, were in substance the same, a copy of one of which said bonds, to wit, No. 42, is hereto attached, and made a part of this declaration. Marked Exhibit "A."

And plaintiff alleges that defendant did at, &c., on, &c., last aforesaid, execute and deliver to the said W. H. W. Cushman ten interest coupons attached to each of said bonds, numbered to correspond therewith, for fifty dollars each, as representing the annual interest at the rate of ten per cent. per annum, to thereafter become due upon said bonds. Plaintiff avers that each of said coupons was signed by the said Henry A. Shuler,
9 mayor, and countersigned by the said R. N. Waterman, clerk of said city; and that in and by each of said coupons defendant promised to pay bearer at the maturity thereof fifty dollars, at the St. Nicholas National Bank, in the city of New York, as one year's interest upon the bond referred to by number therein.

Plaintiff further avers that each of said bonds contains the following recital, to wit: "This is one of one hundred and twenty bonds of like amount and even date herewith, numbered one to one hundred and twenty respectively, issued by the city of Ottawa, by virtue of the charter of said city, wherein it is provided that the city council shall have power to borrow money on the credit of the city and to issue bonds therefor, and pledge the

revenue of the city for the payment thereof, provided that no sum or sums of money shall be borrowed at a greater interest than at ten per cent. per annum." (Article 5, sec. 3.)

"No money shall be borrowed by the city council until the ordinance, passed therefor, shall be submitted to and voted
10 for by a majority of the voters of said city attending an election for that purpose. (Article 10, section 20.) And also in accordance with a certain ordinance passed by the city council of said city, on the 15th day of June, A. D. 1869, entitled an ordinance to provide for a wall for municipal purposes, which ordinance was ratified by a majority of all the qualified voters of said city, at an election holden on the 20th day of July, A. D. 1869, and in conformity with an ordinance passed by the city council of said city, on the 30th day of July, 1869, entitled an ordinance to carry into effect the ordinance of June 15th, 1869, entitled an ordinance to provide for a ~~wall~~ loan for municipal purposes."

"And plaintiff further avers that he did on, to wit: the first day of August, A. D. 1870, at, to wit: New York city, become the purchaser for a valuable consideration, and owner of a portion of said one hundred and twenty bonds, to wit: Bonds numbers forty-one to sixty-one, both inclusive, for value, before due, in the usual course of business, without notice of any
11 defences thereto. Plaintiff further avers that he did on, &c., at, &c., last aforesaid, also become the purchaser and owner of one hundred interest coupons belonging to said bonds, last aforesaid, for value, before due, in the usual course of business, without notice of any defences thereto, and that he is still the owner and bearer thereof, whereby defendant became liable to pay plaintiff the several sums of money in said coupons mentioned, when the same should respectively become due. And plaintiff avers that defendant being so liable as aforesaid, did on, to wit: the said first day of August, A. D. 1870, at, to wit: said northern district, promise plaintiff to pay him said several sums of money in said bonds and coupons mentioned, when the same should thereafter respectively become due. And plaintiff further avers that he did, when said coupons thereafter respectively became due, present the same for payment, and demand payment thereof at, to wit: the St. Nicholas National Bank, of New York city, but plaintiff avers payment thereof was refused. Plaintiff further avers that all of said one hundred coupons
12 were long past due before the bringing of this suit, and that defendant had neglected and refused to pay the same or any part thereof although often requested so to do at, to wit: said northern district.

Nevertheless the said defendant (although often requested, etc., to wit: on the day when the said coupons became due and pay-

able according to the tenor and effect thereof, and oftentimes since, to wit: at the district aforesaid) has not yet paid the several sums of money above mentioned, nor any or either of them, or any part thereof to the said plaintiff; but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of said plaintiff of six thousand dollars, and therefor the said plaintiff brings suit, etc.

S. G. ELDREDGE and SCHOLES and MATHER,
His Attorneys.

Copy of instrument sued on.

"No. 41. City of Ottawa. Interest warrant, $50.00. "The City of Ottawa promises to pay bearer, 2d August, A. D. 1874, fifty dollars, at St. Nicholas National Bank, New York city, being one year's interest on bond numbered as above.

13 "HENRY A. SHULER, *Mayor.*
"R. N. WATERMAN, *Clerk.*"

The defendant or its counsel is hereby notified that the plaintiff will offer in evidence at the trial, and rely upon one hundred interest coupons of like tenor as the foregoing copy, except as to numbers and dates of maturity.

No. 42. *Exhibit "A."* $500

"The United States of America.
"State of Illinois. "City of Ottawa.

"City of Ottawa ten per cent. bond.

"The City of Ottawa acknowledges itself indebted and promises to pay to W. H. W. Cushman, or to the bearer hereof, the sum of five hundred dollars, lawful money of the United States of America, at the St. Nicholas National Bank of the City of New York, ten years from date, with interest at the rate of ten per cent. annum until paid, payable annually at said bank on presentation of the several coupons hereto annexed as they shall severally become due, and to the payment of the principal and of the several coupons hereto annexed, and of the interest as aforesaid, after maturity, the faith of the city is hereby irrevocably pledged.

14 This is one of one hundred and twenty bonds of like amount and even date herewith, numbered one to one hundred and twenty respectively, issued by the City of Ottawa by virtue of the charter of said city, wherein it is provided that the city council shall have power to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof, provided that no sum or sums of money shall be borrowed at a greater interest than ten per cent. per annum. Art. V, sec. 3.

"No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election for that purpose. Art. X, sec. 20. And also in accordance with a certain ordinance passed by the city council of said city on the 25 cts. 15th day of June, A. D. 1869, entitled 'An ordinance Rev. to provide for a loan for municipal purposes, which St. ordinance was ratified by a majority of all the qualified voters of said city at an election holden on the 20th day 15 of July, A. D. 1869, and in conformity with an ordinance passed by the city council of said city on the 30th day of July, 1869, entitled 'An ordinance to carry into effect the ordinance of June 15, 1869, entitled An ordinance to provide for a loan for municipal purposes."

Witness the signatures of the mayor and clerk of said city, and the corporate seal thereof, this 20th day of August, in the year of our Lord one thousand eight hundred and sixty-nine.

HENRY A. SCHULER,
Mayor.

[C. OF O. SEAL.] R. N. WATERMAN,
Clerk.

(Endorsed.) Filed February 22, '78.
WM. H. BRADLEY,
Clerk.

Afterwards, to wit: on the 19th day of March, A. D. 1878, said defendant, by its attorneys, filed in said clerk's office its pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

16 *Pleas.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

In circuit court, March term, A. D. 1878.

THE CITY OF OTTAWA
ats.
WILLIAM H. Y. HACKETT.

And now comes the defendant, by James G. Johnston, and Charles Blanchard, its attorneys, and defends the wrong and injury, when, &c., and says, "*actio non*," because it says that the sole and only cause of action, if any, said plaintiff hath against said defendant, is the coupons declared upon in the first count of plaintiff's declaration. And further avers that the ordinance re-

ferred to in said declaration, and alleged to have been passed by the city council of said city, on the fifteenth day of June, A. D. 1869, entitled, "an ordinance to provide for a loan for municipal purposes," was in the words and figures, following:

Be it ordained by the city council of Ottawa, that the mayor of the city be, and he is hereby authorized to borrow in the name of the city, at a rate of interest not exceeding ten per
17 cent., the sum of $60,000, for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes; and that bonds of the city be issued therefor, in sums of five hundred dollars, with interest, payable annually, said bonds to be payable one-third in five years, one-third in ten years, and one-third in fifteen years, after the date thereof, provided that no application shall be made of the proceeds of said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose, by the city council, nor until the faithful application of the proceeds of such bonds, to the purpose aforesaid, shall be fully secured to the city.

SEC. 2. Be it also ordained that a sufficient sum to pay the interest on said loan shall be annually provided by taxation, and set apart as a separate fund, and to be applied to the payment of the interest on said bonds, and for no other purpose.

SEC. 3. This ordinance shall be submitted to the voters of the city, to be voted for or against, at an election to be held
18 for that purpose, on the 20th day of July, A. D. 1869. The mannner of the determination shall be by depositing ballots, upon which shall be written or printed "for the loan ordinance," or "against the loan ordinance."

And that the ordinance also referred to in said declaration, and therein alleged to have been passed by the city council of said city on the thirtieth day of July, A. D. 1869, entitled "An ordinance to carry into effect the ordinance of June fifteenth, A. D. 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" was in the words and figures following:

Whereas by an ordinance passed by the city council on the 15th day of June, A. D. 1869, it was provided that the mayor of the city should be authorized to borrow in the name of the city sixty thousand dollars, to be expended in developing the natural advantages of the city for manufacturing purposes, and to issue the bonds of the city therefor; and whereas it was provided by said ordinance that the same should be submitted to the voters of the city, to be voted for or against at an election to be holden for that purpose on the 20th day of July, A. D. 1869; and
19 whereas at said election the said ordinance was ratified by the voters of the city by a majority of 823 votes, being a majority of the legal voters of the city.

Now, therefore, be it ordained by the city council of the City of Ottawa that the bonds of the city for the sum of sixty thousand dollars be issued by the mayor in accordance with the terms and conditions of said ordinance of June 15, 1869, and that he deliver the same to William H. W. Cushman, to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the sum in the improvement of the water power upon the Illinois and Fox rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose by the legislature of the State, or which may hereafter be granted for that purpose, in the manner which in his judgment shall best secure the practical and permanent use of said water power in the city and its immediate vicinity,
20 provided that said Cushman shall execute and deliver to the mayor an agreement from him to the City of Ottawa that he will without unreasonable or unnecessary delay cause a good, substantial and sufficient dam to be constructed across the Illinois river above the city to bring into use all the available water power of said river at Ottawa, and will construct sufficient head and rail races to make such water power available, said races to be constructed and continued to the Fox river below the aqueduct and above the island in Fox river as fast as the same may be required for actual use, and as fast as said water power can be leased at fair and reasonable rates and be brought into actual operation; and that he will also erect a good, substantial and sufficient dam across Fox river, so as to make available the water power of both rivers at Ottawa as soon as the additional water power created by such dam across Fox river can be brought into actual use by being leased at reasonable and fair rates, so as to have all the available water power of both rivers at
21 Ottawa ready for use as rapidly as called for. And provided, also, that said Cushman shall bind himself that if said work is not constructed as aforesaid that he will return said bonds to the city, or the value of the same, and save it harmless from all loss on account of the same or on account of interest accruing thereon; and in case said work shall not be completed by said Cushman, then to return a *pro rata* share of said bonds in the proportion that the cost of the work constructed shall bear to the part of the work not constructed: provided that at least one of the dams above mentioned, with the races necessary to make the water power thereby created available for practical use, shall be completed, or the whole of said bonds shall be returned to the city by said Cushman.

The interest of this ordinance being to secure the improvement and development of said water power in this city by appropriating the loan obtained under the ordinance aforesaid for that purpose,

or *pro rata* so far as said water power shall be made available for practical use.

25 Defendant further alleges that the eighteenth general assembly of the State of Illinois convened in January, A. D. 1851, passed an act approved February 15, 1851, entitled "An act to authorize certain persons to construct a dam across Fox river for hydraulic and manufacturing purposes."

By said act said William H. W. Cushman and other persons named in the first section thereof, and their associates and successors, were created a body politic and corporate under the name and style of "The Ottawa Manufacturing Company." That the substantial rights and privileges granted to said company were set forth in the second section of said act, as follows:

"The said company, when formed, are hereby authorized to build a dam across Fox river on section eleven (11) or twelve (12), in township thirty-three (33), north of range three (3), east, in La Salle county, for the purpose of creating a water power; and the said company may use, lease or otherwise dispose of the same, and may construct such other works, buildings and machinery as may be deemed necessary or proper to use

23 such water power to promote the interests and objects of the company."

Further, that the twenty-fourth general assembly of the State of Illinois, convened January 2, A. D. 1865, passed an act, approved February 16, 1865, entitled "An act to amend an act to authorize certain persons to construct a dam across Fox river for hydraulic and manufacturing purposes," approved February 15, 1851, which act was in the words and figures following:

SEC. 1. That the said company shall have, in addition to the powers granted in and by the said act to which this is an amendment, the right, for all the purposes mentioned in the said act, to build a dam across the Illinois river at such point as the said company may elect, and also the right to construct a race or races for the purpose of introducing the water into the pool of the dam authorized to be erected across the Fox river; and for any or all the purposes contemplated by this act, and by the act to which this is an amendment, may take and use such portion of any highway, street, alley or public ground as may be deemed necessary.

24 SEC. 2. Section nine (9) of the act to which this is an amendment is hereby amended by adding at the end of the same the following:

"Provided, that no action or other proceeding shall be had against said company on account of the erection of said dams, race or races, unless within one year after the erection or construction of the same or any or either of them."

SEC. 3. The fourth (4) section of said act to which this is an amendment shall read as follows: "The capital stock of said company may be fixed by the same and divided into shares, and may be increased or diminished."

SEC. 4. The name of "Henry G. Cotton" in the first section of the said original act, is stricken out, and the names of "Dwight Cameron" and "John F. Nash" are hereby inserted in its stead. Approved Feb. 16, 1865.

Defendant further avers that said act so incorporating "The Ottawa Manufacturing Company," and said act amendatory thereto, were the same franchises and powers referred to in said ordinance passed July thirtieth, A. D. 1869, as having been granted "for that purpose," by the legislature of the
25 State of Illinois, and under which said Cushman was authorized and directed to expend the proceeds of the bonds aforesaid. "A."

Further, that the said "Ottawa Manufacturing Company" was a private corporation, organized for private business ends solely, and in no way connected with or controlled by the defendant municipality. And that said bonds, so issued and delivered by said defendant municipality to said Cushman, was in all respects a simple donation to said Cushman, or to said "Ottawa Manufacturing Company," to aid him or it in prosecuting a private enterprise set forth in the aforesaid ordinances, passed by the city council aforesaid, and were not issued for any municipal purpose whatever.

Further, that the action of said city council, in issuing said bonds, was without authority of law, and the same are null and void.

And this said defendant is ready to verify, wherefor it prays judgment, &c.

And for a further plea in this behalf defendant says *actio non*, because it says as it has already said in its second plea
26 to "A." And further alleges that said Cushman did execute and deliver to the then mayor of the city of Ottawa an agreement substantially in compliance with said ordinance, passed by the city council of said city of Ottawa, July thirtieth, A. D. 1869.

Yet said Cushman has not caused a good substantial and sufficient dam to be constructed across the Illinois river, above the city, to bring into use all the available water power of said river, at Ottawa; nor has said Cushman constructed sufficient head and rail races to make such water power available; nor has said Cushman erected a good substantial and sufficient dam across Fox river, so as to make available the water power of both rivers, at Ottawa, in manner and form as provided in said ordinance and agreement.

Nor hath said Cushman kept and performed any of the promises or covenants mentioned in said ordinance and agreement, to be kept and performed by him, of all which said plaintiff had notice when he purchased said bonds and coupons.

And this defendant is ready to verify; wherefor it prays
27 judgment.

JAMES G. JOHNSON,
Attorney for Defendant.

CHARLES BLANCHARD,
CHARLES B. SUMNER,
Of Counsel.

(Endorsed.) Filed March 19, 1878.

WM. H. BRADLEY,
Clerk.

Afterwards, to wit: on the 3d day of April, A. D. 1878, said plaintiff, by his attorneys, filed in said clerk's office his demurrer to the second and third pleas of said defendant in said entitled cause, which said pleas are in the words and figures following, to wit:

Demurrer to Second and Third Pleas.

UNITED STATES CIRCUIT COURT,
Northern District of Illinois:

March term, A. D. 1878.

WILLIAM H. Y. HACKETT }
vs. }
THE CITY OF OTTAWA. }

And now comes the said plaintiff, by Scholes and Mather, and G. S. Eldredge, his attorneys, and says that the said pleas of the said defendant, by him secondly and thirdly pleaded
28 herein, are, and each of them is insufficient in law to be answered unto, &c., and of this the said plaintiff prays judgment, &c.

SCHOLES and MATHER and ELDREDGE,
Plaintiff's Attorneys.

(Endorsed.) Filed April 3, 1878.

WM. H. BRADLEY,
Clerk.

Afterwards, to wit: on the 16th day of May, A. D. 1878, in the adjourned May term of said court, in the record of proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM H. Y. HACKETT
vs.
THE CITY OF OTTAWA, } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the plaintiff to the second and third pleas herein, and after hearing a part of the arguments of counsel, the hour of adjournment having arrived, the further arguments of counsel are postponed until to-morrow morning.

29 Afterwards, to wit: on the 17th day of May, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM H. Y. HACKETT
vs.
THE CITY OF OTTAWA. } Assumpsit.

Now come again the parties by their attorneys, and now comes on further to be heard the demurrer of the plaintiff to the second and third pleas herein, and after hearing the concluding arguments of counsel the court takes the same under advisement.

Afterwards, to wit: on the 18th day of September, A. D. 1878, in the July term of said court, in the record of the proceedings thereof, in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM H. Y. HACKETT
vs.
THE CITY OF OTTAWA. } Assumpsit.

Now comes G. S. Eldredge, Esq., the attorney of the plaintiff, and suggests to the court the death of the plaintiff since

30 the commencement of this suit and the appointment of William H. Hackett, Frank W. Hackett, and Robert C. Pierce, as executors of the last will and testament of said William H. Y. Hackett, deceased, and on motion of said attorney, and with the consent of the defendant's attorney, it is ordered that said William H. Hackett, Frank W. Hackett, and Robert C. Pierce, as executors aforesaid, be, and they are hereby, made plaintiffs herein, and that this cause proceed in their names as executors.

And on the same day, to wit: the 18th day of September, A. D. 1878, in the said July term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM H. HACKETT, FRANK W. HACKETT, and ROBERT C. PIERCE, as executors of the last will and testament of WILLIAM H. Y. HACKETT, deceased,
vs.
THE CITY OF OTTAWA.
} Assumpsit.

Now come the plaintiffs, by G. S. Eldredge, Esq., their attorney, and the defendant, by Charles H. Lawrence, Esq., its
31 attorney, and on motion of the plaintiffs by their attorneys, leave is given them to amend the declaration herein by striking out the common counts thereof; and on motion of the defendant by its attorney, leave is given it to withdraw its plea of the general issue herein, and the court having considered and being now sufficiently advised upon the demurrer of the plaintiffs to the second and third pleas herein overrules said demurrer; and the plaintiff failing to make further answer to said pleas, and electing to abide by their said demurrer, the court enters judgment thereon, and orders that this cause be dismissed at the costs of the plaintiffs. It is thereupon considered and adjudged by the court that the defendant do have and recover of the plaintiff its costs and charges about its defense in this behalf expended, amounting to the sum of sixteen dollars and ten cents, and that it have execution therefor.

Afterwards, to wit, on the eighth day of October, A. D. 1878, said plaintiffs, by their attorney, filed in said clerk's office their bond in said entitled cause, which said bond is in the words and figures following, to wit:

32 *Bond.*

Supreme Court of the United States.

CIRCUIT COURT OF THE UNITED STATES,
For the Northern District of Illinois.

WILLIAM H. HACKETT, FRANK W. HACKETT and ROBERT C. PIERCE, executors of the last will and testament of WILLIAM H. Y. HACKETT, deceased,
vs.
THE CITY OF OTTAWA.

Know all men by these presents, that we, William H. Hackett, Frank W. Hackett and Robert C. Pierce, executors of the last will and testament of William H. Y. Hackett, deceased, of Portsmouth, in the State of New Hampshire, as principals, and Lester H. Eames, of the county of La Salle and State of Illinois, as security, are held and firmly bound unto the city of Ottawa, in the county of La Salle and State of Illinois, in the sum of one

thousand dollars, to be paid to the said the city of Ottawa; for which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our
33 heirs, executors and administrators firmly by these presents.

Sealed with our seals, dated twenty-third day of September, A. D. 1878.

Whereas the above William H. Hackett, Frank W. Hackett and Robert C. Pierce, executors of the last will and testament of William H. Y. Hackett, deceased, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the circuit court of the United States for the northern district of Illinois.

Now, therefore, the condition of the above obligation is such that if the above named William H. Hackett, Frank W. Hackett and Robert C. Pierce, executors of the last will and testament of William H. Y. Hackett, deceased, of Portsmouth, New Hampshire, above named, shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

WILLIAM H. HACKETT, [SEAL.]
FRANK W. HACKETT, [SEAL.]
ROBT. C. PIERCE, [SEAL.]
Executors, &c., of Wm. H. Y. Hackett, deceased.
LESTER H. EAMES. [SEAL.]

34 Approved.

H. W. BLODGETT,
Judge.

Endorsed: Filed Oct. 8, 1878.

WM. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct and complete transcript of the record of all the proceedings had in said court in the cause wherein William H. Hackett *et al.*, executors, &c., are plaintiffs, and the City of Ottawa is the defendant, as the same appears from the files and records of said court, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 8th day of October, A. D. 1878, and of
[SEAL.] our Independence the one hundred and third year.

WM. H. BRADLEY,
Clerk.

35 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America, to the judge of the circuit court of the United States for the northern district of Illinois, greeting.

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you, in said circuit court, between William H. Hackett, Frank W. Hackett, and Robert C. Pierce, executors of the last will and testament of William H. Y. Hackett, deceased, and the City of Ottawa, in an action of assumpsit, a manifest error hath happened, to the great damage of the said William H. Hackett, Frank W. Hackett, and *Albert* C. Pierce, executors, &c., and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. 1878, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirteenth day of September, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 103d year.

[SEAL.] WM. H. BRADLEY,
Clerk.

Endorsed: Supreme Court of the United States; William H. Hackett *et al.*, executors, &c., *vs.* City of Ottawa. Writ of error.

36 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the City of Ottawa, greeting.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1878, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein William H. Hackett, Frank W. Hackett, and Robert C. Pierce, executors of the last will and testament of William H. Y.

Hackett, deceased, are the plaintiffs in error, and the City of Ottawa is the defendant in error, to show cause, if any there be, why the error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Henry W. Blodgett, Associate Judge of said Court, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

H. W. BLODGETT,
Judge.

Supreme Court of the United States.

WILLIAM H. HACKETT *et al.*, executors, &c., }
vs. }
CITY OF OTTAWA. }

Citation to October term, A. D. 1878.

We hereby accept service of the within writ for the City of Ottawa, this 10th day of October, A. D. 1878.

CHARLES BLANCHARD,
C. R. LAWRENCE,
Attorneys for City of Ottawa.

Endorsed on the cover: N. ILLINOIS, *C. C. U. S.*: NO. 880. William H. Hackett, Frank W. Hackett, and Robert C. Pierce, executors of the last will and testament of William H. Y. Hackett, deceased, plaintiffs in error, *vs.* the City of Ottawa. Filed October 15, 1878.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 880.

WILLIAM H. HACKETT, FRANK W. HACKETT, AND ROBERT C. PIERCE, EXECUTORS, &c., OF WILLIAM H. Y. HACKETT, DECEASED, PLAINTIFFS IN ERROR.

vs.

THE CITY OF OTTAWA, DEFENDANT IN ERROR.

BRIEF OF FRANK W. HACKETT, OF COUNSEL FOR PLAINTIFFS IN ERROR.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 880.

WILLIAM H. HACKETT, FRANK W. HACKETT, AND ROBERT C. PEIRCE, EXECUTORS, PLAINTIFFS IN ERROR,

vs.

THE CITY OF OTTAWA, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS.

The city of Ottawa, Illinois, was incorporated by a special act of the legislature, approved February 10, 1853.

The charter (Laws of Illinois, 1853, p. 300,) provides (art. V., sec. 3,) that the city council shall have power "to borrow money on the credit of the city, and to issue bonds therefor, and pledge the credit of the city for the payment thereof: provided that no sum or sums of money shall be borrowed at a greater interest than at ten per cent. per annum." It then proceeds to enumerate powers such as are usual in city charters, viz: to establish hospitals, to provide the city with water, to establish, erect, and keep in repair bridges, to erect market houses, to provide needful buildings for the use of the city, to erect public wharves and docks, and the like. The thirty-seventh section of the same article authorizes the council "to subscribe for and take shares of stock in any bridge to be built within the limits of the city,

or in any plank road leading from said city to be constructed by any company incorporated or to be incorporated by law for such purposes," with a provision that the proposition to take stock be submitted to a vote of the electors of the city. Article X, section 20, provides that "no money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose." (*Ib.*, p. 316.)

I.

The language of the charter, "*to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof*," conferred upon the corporate authorities power as ample to negotiate the bonds in this suit as if a legislative enactment had specially provided for their issue.

1. The words employed by the charter are purposely broad and comprehensive. The constitution of 1848, then in force, contained the clause: "The general assembly shall encourage internal improvements by passing liberal general laws of incorporation for that purpose." (Art. X, sec. 6.) However mistaken may have been the policy, the fact is undisputed that legislatures in the Western States afforded facilities to municipal corporations to aid public enterprises far beyond the resources of ordinary yearly taxation to sustain. In the thirty-seventh section, just quoted, this charter recognizes the anticipated building of a bridge and a plank road. That the private parties who stood ready to embark their capital in these useful undertakings saw fit to obtain for the city legislative indorsement in addition to the power already given, in express terms, does not negative the right of the city, at a later day, to lend its credit without special legislation. As to a loan contemplated at the very time the

charter was passing through the legislature, nothing could be more natural than to add a clause specifying these two projects as within the range of those objects for which the city might exercise the right of borrowing money. Legislation of this character, simply declaratory of a power already conferred, is frequently resorted to as a convenient method of setting to rest every possible doubt. The thirty-seventh section simply designates two directions in which the power lodged in the city council by the third section (taken in connection with the safeguard of an election provided for by article X, sec. 20,) may be exercised. Had it been intended to supersede the third section entirely in these cases, it would have contained some reference to the issue of bonds for the special purposes of these two improvements.

2. Clauses in municipal charters not more sweeping than this, have been held to confer power to issue bonds in aid of public enterprises. The validity of bonds in Gelpcke *vs.* Dubuque, (No. 81,) 1 Wall., 220, rested upon the extent of the authority conferred by a clause in the charter "whenever in the opinion of the city council it is expedient to borrow money for any particular purpose the question shall be submitted to the citizens," etc. It is true the court speak of the authority implied in a statute which enacts that "whenever any company shall have received or may hereafter receive the bonds of any city or county upon subscription of stock by such city or county, such bond may bear an interest at a rate not exceeding ten per cent.;" and further, that "the provisions of this act shall apply to any railroad bonds which have been heretofore issued as well as to those which may hereafter be issued." But it is difficult to conceive how this statute confers any power; it simply recognizes the fact that from another source cities have derived an authority to issue bonds. Mr. Justice Clifford, in delivering the opinion of the court upholding

bonds the authority to issue which was derived from words in a charter, viz: "Whenever in the opinion of the city council it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens," etc., uses the following language: "The decision in the case of Gelpcke *vs.* The City of Dubuque, although the opinion of the court contains a reference to other statutes, was chiefly founded upon the construction of a provision expressed in the same words as the provision contained in the charter of the defendants." Rogers *vs.* Burlington, 3 Wall., 654. In Meyer *vs.* City of Muscatine the language of the charter was: "To borrow money for any object in its discretion, if at a meeting two-thirds of the citizens determine in favor of the loan." 1 Wall., 384.

It was argued by counsel in these cases that the power thus given in the respective charters ought to be construed as limited in its exercise to the various objects enumerated therein, but the court favored no such narrow interpretation.

Mr. Justice Miller, in expressing his dissent from the opinion of the Court, in the last mentioned case, observes: "It is not claimed that there was any act of the legislature authorizing the city of Muscatine to take stock in railroad companies. The principle on which the validity of the bonds is sustained is, that the charter of the city confers on it an unlimited right to borrow money, and that having issued its bonds, which have been sold in the market, they must be held to be valid, although the purchaser knew they were issued for railroad purposes." The authority of these decisions is further sustained by the judgment in Mitchell *vs.* Burlington, where bonds in aid of a plank road were held valid, under the general power granted in the charter as above. 4 Wall., 270.

None of these charters contained a power in express words to issue bonds, as in the case at bar. It need hardly

be argued that the language of the charter of the city of Ottawa, "to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof," contemplated as broad a grant of power as that interpreted by these decisions.

II.

A power to borrow money and issue bonds therefor includes the right to make a donation.

The city council are the depositary of this power, subject to ratification by the voters. To authorize them to loan their credit, and deny them the right to employ their best judgment as to the terms of the transaction, would be to defeat the object for which the authority was granted, viz.: to benefit the city by a wise use of its resources. Authority to appropriate such sum as a town thinks proper to aid in the construction of a road sustains a donation. (R. R. *vs.* Smith, 62 Ill., 268.) Unless restrained by a constitutional provision of some sort, the Legislature may authorize a county to aid a railroad corporation by issuing bonds, and giving them to the company as a donation. (R. R. Co. *vs.* Otoe, 16 Wall., 675.) What a Legislature may do by special law, the city of Ottawa had the power to do under its charter, viz.: aid a public enterprise by a donation. It is not necessary to insist that it is expected by a donation to receive public benefit in return. "There is no solid ground of distinction between a subscription to stock and an appropriation of money or credit. Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage; * * both may be equally burdensome to the taxpayers of the county. The stock subscribed for may be worthless, and known to be so." (*Per* Strong, J., R. R. *vs.* Otoe, *ut supra.*)

III.

Power to issue bonds for public purposes being lodged in the corporate authorities, and they having put upon the market a negotiable security which purports on its face to have been issued by a municipal corporation that had charter authority to issue bonds for municipal purposes, defendants are estopped from setting up that in point of fact the purpose was not municipal, when the bond itself recites that the loan is for municipal purposes, and has come into the hands of a *bona fide* purchaser, who took it relying on such recitals, and without actual notice of the purpose for which it was issued other than as disclosed on the face of the bond itself.

That the defendants had power to issue bonds for municipal purposes is not disputed. The words "*loan for municipal purposes*" appear twice on the face of the bond, and were put there unquestionably to insure their ready sale in the market. The city officials, under the seal of the city, certify: 1. That an ordinance was passed by the city council "to provide a loan for municipal purposes." 2. That this ordinance was ratified by a majority of the qualified voters of the city. 3. That the city council passed an ordinance to carry into effect the prior ordinance "to provide a loan for municipal purposes."

It was contended below that the purchaser was bound to consult the records of the city council of Ottawa and ascertain for himself if the purposes disclosed upon full knowledge of their contents were, as alleged in their titles, municipal. In a long line of cases where a condition precedent was required by legislative enactment to be complied with before the municipal or county authorities could legally issue bonds, this Court has steadily maintained that a recital in the bond itself of such compliance is conclusive of the fact, when the bond is held by a *bona fide* purchaser, and when it may be gathered from the legislative enactment that the

municipal officers were invested with power to decide the fact of such compliance.

In every instance the municipality that sought to evade payment of its obligations upon the argument insisted that the purchaser ought to have consulted the record, where he would have found the informalities relied on in defence. But this court has deemed it to be just and right to impose no such clog upon the negotiability of municipal bonds. In holding that the recital on the bond was itself a decision by the proper officer that the requisite formalities had been duly complied with, the court recognized the fact that the Legislature meant to give authority to municipalities to negotiate securities which would command on their face the confidence of distant purchasers. The underlying reason of the rule is that anything short of that would virtually permit repudiation under form of law. Does not the necessity of the rule laid down for the protection of the holders of negotiable securities, that the recital on their face of a compliance with stringent formalities shall be held final and binding on the municipality that issues them, apply with equal force in the present case?

True, in the cases hitherto decided there was no question raised as to the purpose for which the bonds were given. It is believed that Beasley *vs.* Burlington, 94 U. S., 312, is the only instance where the security itself does not show on its face the precise object in aid of which it was put upon the market; and the record in that case shows that a question similar to this under discussion was certified to the court, which it did not become necessary to decide. In those cases the bond recited that it had been regularly issued under a power which was undisputed. Here the very existence of the power itself, it may be objected, is sought to be set up by a recital in the bond. That a valid distinction, for some purposes, exists between the case of a power conceded to have been granted, with a requirement that it be exercised in a certain defined manner, and that where it is

denied that any power has been granted to be exercised in the premises at all, does not admit of denial. Of course, a mere assertion of power in the recital of a bond is nothing, unless there be authority to make the assertion. But the question is, may not the assertion of the existence of the power be made under such circumstances as to estop the party from denying it? The doctrine certainly commends itself to our sense of justice, that where authority exists in a corporation for any purpose to borrow money and issue bonds, a recital formally made on the face of its bonds that the transaction is within the range of that purpose, ought to be as binding upon the corporation that has received the money of a third person upon the strength of such representation, as is a recital in a certain class of cases that the requisite forms of law have been duly followed. Opportunities to deceive the public are as ready in the one case as the other. In one respect the cases are alike: the recital may be of a mere matter of fact. One class of bonds recites that a majority of voters have favored the loan; another, that the object for which the money is borrowed, and for which the consent of voters has been obtained, is a municipal object. Sometimes it becomes a question of law to determine what constitutes a "majority of voters;" so it may be for the courts to say whether the purpose be a municipal one. But there is a large class of objects, purely municipal in their character, for which, under the charter, the city council is empowered, without a shadow of doubt, to borrow money and to issue bonds. Within the range of these objects the city council has authority that is final to decide whether the municipal requirements justify a loan of money and an issue of bonds. The record shows that the bonds in suit are payable, principal and interest, in a distant city, and were bought by the plaintiff's decedent in New York, without notice, in good faith. Nothing on their face tended to awake suspicion that they were not issued, as they purported to be, for municipal purposes.

Why does not the rule of the other cases apply? The power is in the city to issue bonds for many muncipal purposes; why should the purchaser be compelled to search the record of the city council of Ottawa, to find out whether the official seal of that city has been put to an untruth?

It is said that the particular purpose may be ascertained by reference to the original vote of the council; and if the purpose were found not to be municipal, the bonds would show on their face that they were unauthorized and void. The simple answer to this is, that had the bonds contained no recital whatever of their purpose, it might be well urged that the purchaser bought at his peril: the first thing a prudent man would do, under such circumstances, would be to satisfy himself to what particular object the money he is invited to invest is to be devoted. But here just enough was said to set at rest enquiry: "a loan *for municipal purposes*," it does not concern the lender whether his earnings are going to be expended on water-works or a market-house; his confidence has been won that a city needing funds for municipal expenditures will honorably keep her engagements. To permit defendants to contradict the recital in the bonds, is to hold the purchaser guilty of negligence in imparting absolute verity to a recital of fact as to the truth of which defendants had ample knowledge, and which they inserted twice in their negotiable securities in order to induce him the more readily to part with his property.

In Storey *vs.* American Life Ins. Co., 11 Paige, 635, it was held that a negotiable security of a corporation, which, upon its face, appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in point of fact issued *for a purpose*, and at a place *not authorized* by the charter of the corporation. Cited with approval in Supervisors *vs.* Schenck, where Mr. Justice Clifford says that this is settled law. 5 Wall., 784.

Says Selden, J., in Farmers' and Mechanics' Bank *vs.* Butchers' and Drovers' Bank, 16 N. Y., 125, "A citizen who deals directly with a corporation, or who takes its negotiable paper, is presumed to know the extent of its corporate powers. But when the paper is upon its face in all respects such as the corporation has authority to issue, and its only defect consists in some extrinsic fact, such as the purpose and object for which it was issued, to hold that the person taking the paper must enquire as to such extraneous fact, of the existence of which he is in no way apprised, would obviously conflict with the whole policy of the law in regard to negotiable paper."

The Supreme Court of Indiana sustains this just doctrine to its fullest extent. The M. and F. R. R. Co. issued bonds payable to the order of the M. and I. R. R. Co., to get money to complete the former road. The bonds were delivered to the latter company, indorsed and guaranteed by them, and sent to their agent at New York for sale. The agent, in a circular, represented that they were owned by the M. & I. Co. In a suit brought by a *bona fide* holder upon the guaranty, *Held* that as the contract of guaranty was such a contract as the company had power to make, the fact that in this case the guaranty was made for a purpose not authorized by the charter, (for the accommodation of another road,) could not affect plaintiffs' title to recover. The opinion disapproved of Snead *vs.* R. R. Co., 11 Ind., 104, which had established a distinction between paper executed *ultra vires* and that executed within the power of the corporation, but by an abuse of the power in that particular instance. Mad. & Ind. R. R. Co. *vs.* Savings' Society, 24 Ind., 461.

"When a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached in the hands of such holder than any other commercial paper."

Per Swayne, J., Gelpcke *vs.* Dubuque, 1 Wall., 175.

The authorities on this subject are reviewed by Judge Cooley, in a note to page 268, fourth edition, Constitutional Limitations.

IV.

But these bonds were issued for a purpose unquestionably public.

The ordinances of June 15 and July 20, 1869, (Record, pp. 8, 9,) show that the paramount object sought to be effected was "developing the natural resources of the surroundings of the city," and the "improvement and development of the water power upon the Illinois and Fox rivers within the city." The water power thus to be obtained was to be enjoyed not alone by the manufacturing company, but to be leased, at reasonable and fair rates, to all comers. The express requirement was "to have *all* the available water power of both rivers at Ottawa ready for use *as rapidly as called for*." Called for by whom? By the public at large.

It is not easy to conceive of an improvement more essentially public in character. The dams across the river would be permanent structures. Unlike a factory, where the building and land may be sold and devoted to other purposes, these great structures were to remain, a never-failing source of prosperity to the city. As Shaw, C. J., says:

"The establishment of a great mill power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the commonwealth, and in our judgment, rightly so, in determining what is a public use, justifying the right of eminent domain." Hazen *vs.* Essex Co., 12 Cush., 478.

By its charter the manufacturing company were empow-

ered to enter upon and flow lands under the right of eminent domain. Private Laws of Ill. 1851, pp. 179–80. Record, p. 23.

In fixing the limits to which the legislature may authorize the exercise of this right, the principle has become well established that the question whether a particular structure, as a bridge, or a lock, or a canal, or road is for the public use, is for the legislature to decide, and their decision may be presumed to be correct. *Per* Shaw, C. J., *ut supra*. The provision in the charter of this company granting this right amounts to a declaration by the legislature that in their opinion these structures were for the public use.

Under the decision in Munn *vs.* Illinois, 94 U. S., 113, the legislature would have had power to fix the rate of toll for use of this water power.

There is much force also in the reasoning submitted in Mr. Eldredge's brief to the point that as the charter authorized the city council "to provide the city with water, and erect hydrants and pumps in the streets," the building of these dams and creating a head of water which the city would have the right to use, became an undertaking of a corporate and municipal character.

There is no need to discuss the vexed question whether a distinction is to be recognized in the meaning of *public use*, as employed in the law of eminent domain and of taxation. The essential feature of this enterprise, which stamps it as of a public nature, is the fact that the public were to share directly in the accruing advantages. The river, in its natural state as a highway, is no more truly public than was the water power, to be directed into numberless channels, at the bidding of those who should pay a reasonable toll therefor, subject to be regulated by legislative supervision. A bridge is none the less public because a toll be levied upon those who use it. The circumstance that the company were to construct dams for the *public use* need be relied upon only as legislative confirmation of what is ap-

parent upon a survey of the proposed plan of improvement.

No one will presume to deny that a municipal corporation cannot issue bonds in aid of a manufacturing enterprise, strictly private, and for the sole benefit of individuals. Loan Association *vs.* Topeka, 20 Wall., 655. This was an undertaking (as was that in Allen *vs.* Jay, 60 Me., 124,) where private persons manufactured articles for their exclusive benefit and profit. At the best, the public were expected to receive only a remote and incidental benefit in these enterprises.

The statutes of Kansas authorize townships to issue bonds "for the purpose of building bridges, free or otherwise, or to aid in the construction of railroad or water power, by donation thereto or the taking of stock therein, and for other works of internal improvement." Statutes of Kansas 1872, c. 63, 110: Burlington *vs.* Beasley, 94 U. S., 310. We allude to the fact simply as showing how, at least one legislature has, by general enactment, regarded the development of water power in relation to municipal taxation.

A recent decision in the New York court of appeals deserves passing remark, because at first sight the facts bear some resemblance to those of the case at bar. Examination, however, discovers a wide distinction between the circumstances there existing and those which this Court are now called upon to consider.

We refer to Weismer *vs.* Village of Douglas, 64 N. Y., 91, where the Court passed upon the validity of certain bonds issued under a special act of the legislature, authorizing the village to take shares in the capital stock of a hydraulic and manufacturing company. The company was chartered for the purpose of constructing a water privilege on the Delaware river and manufacturing lumber. The bonds on their face bore the words "internal improvement fund," and referred by date and title to the acts of the legislature. The decision of the court was put upon the ground that nothing in the charter of the company, or the act authoriz-

ing the village to subscribe, indicated that the enterprise was other than "a private business, to be carried on for private profit, to be controlled by private rules, or even private caprice, into which the public or any member of it could not enter; the direct convenience and benefits whereof neither the public, nor any member of it, could demand as of right." The opinion labors to exclude the least suggestion of public benefit. "No member of the community," says Folger, J., "could insist that he would, at any time or sometime, in accordance with rules operating alike upon all, have personal use of the water privilege, or have his saw logs made into lumber. The corporation could refuse him at any time and at all times. Indeed, they could at any time suspend the use of, or altogether abandon their constructed and improved water privilege and the manufacture of lumber for themselves or for the public, and no one not of their body, could compel to the contrary. * * The act conferring that authority [to dam the Delaware] does not, in its terms, indicate any public use or purpose in the building of the dam."

The act incorporating the company also gave no power to take land *in invitum*, or to flow lands. The case shows a strictly private business enterprise, with no purpose of developing any natural advantages of water power, to be put at the disposal of the public. From the stress that is laid upon the absence of any public interest to be subserved by the enterprise, it may fairly be concluded that had the contract between the town and the company provided for a continuing right in all comers to lease the water power, the validity of the bonds would have been sustained.

To repeat, therefore, we respectfully submit that plaintiffs are entitled to recover, because:

1. The city had ample power under its charter to issue bonds for public purposes.

2. It is immaterial whether the bonds were appropriated for stock or transferred by way of donation in furtherance of the aid proposed.

3. The defendants are estopped by their own recitals from setting up that the purposes of the bonds were not municipal; it being settled that the city had power to issue bonds for municipal purposes, and the securities having been purchased in good faith by a party without notice, other than as contained in the recitals of the purpose for which they were issued.

4. The development of water power, to be leased to the public on fair and reasonable terms by a corporation chartered by the legislature, and granted the right of eminent domain, under the circumstances as disclosed by the record, is a purpose in aid of which the city had ample legislative authority to borrow money and to issue their negotiable bonds.

FRANK W. HACKETT,
Of Counsel for Plaintiffs in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, A. D. 1878.

FRANK W. HACKETT et al.,

Executors of the Last Will, etc., of WILLIAM H. Y. HACKETT, *Deceased,*

Plaintiffs in Error,

vs.

THE CITY OF OTTAWA,

Defendant in Error.

BRIEF ON PART OF PLAINTIFFS IN ERROR.

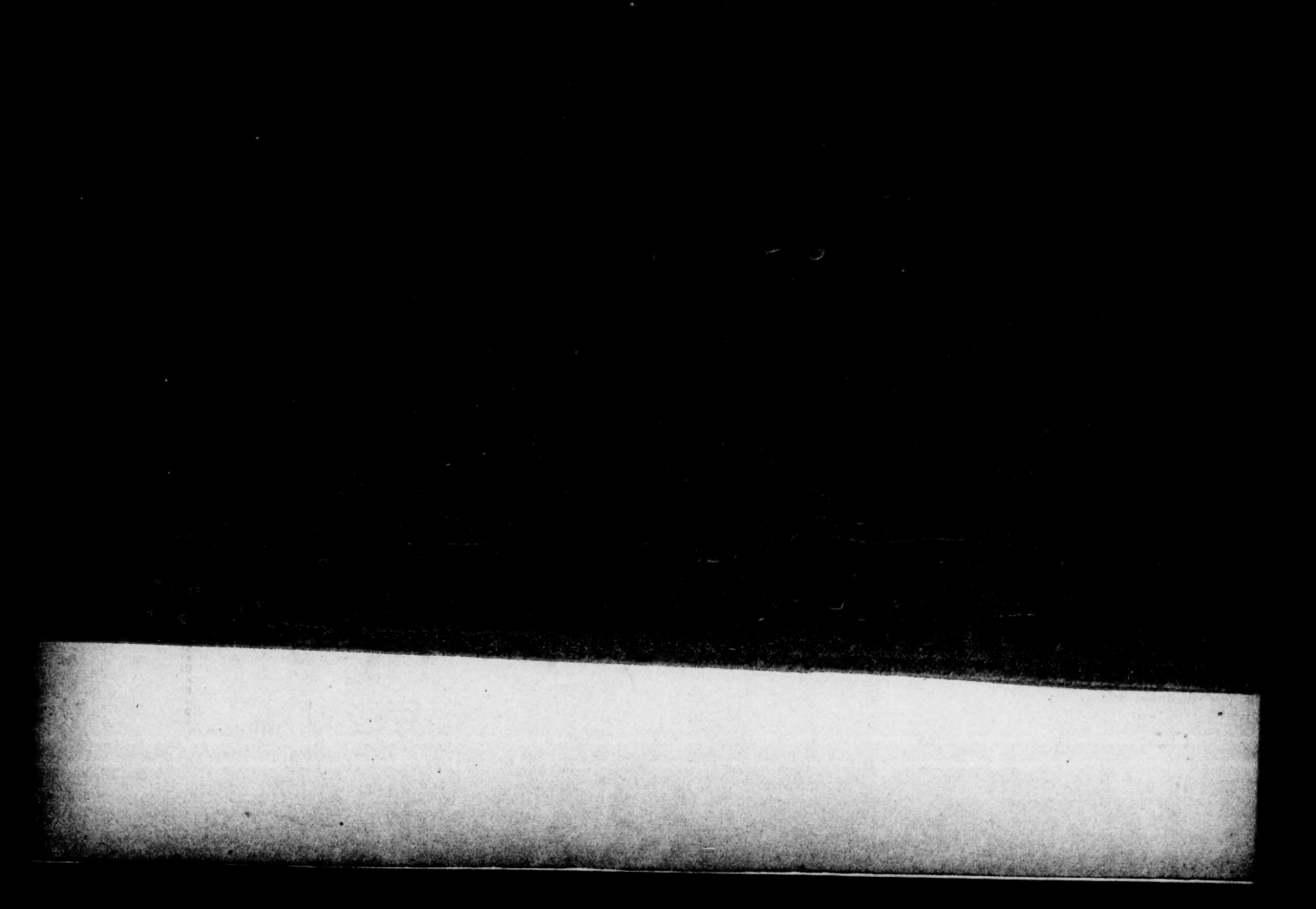
G. S. ELDREDGE,

For Plaintiffs in Error.

Chicago:

BULLETIN PRINTING COMPANY, 113 MADISON STREET.

1878.



United States Supreme Court.

OCTOBER TERM, A. D. 1878.

FRANK W. HACKETT ET AL., Executors of the last will, etc., of WILLIAM H. Y. HACKETT, deceased,
Plaintiffs in Error,
v.
THE CITY OF OTTAWA,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON PART OF PLAINTIFFS IN ERROR.

STATEMENT.

On the 20th of August, A. D. 1869, the city of Ottawa issued one hundred and twenty bonds of $500 each, with interest coupons annexed, and this suit was brought originally

by William H. Y. Hackett against the city of Ottawa, to recover upon one hundred of the interest coupons of fifty dollars each. A copy of one of the bonds is made a part of the declaration, and is set out in *hæc verba*, and appears on page 13 of the Record. The bonds in question contain the following recitals:

"This is one of a series of one hundred and twenty "bonds of like amount and even date herewith, numbered "one to one hundred and twenty, respectively issued by the "city of Ottawa *by virtue of the charter of said city, wherein* "*it is provided that the city council shall have power to* "*borrow money on the credit of the city and to issue bonds* "*therefor, provided that no sum or sums shall be borrowed at* "*a greater rate of interest than ten per cent. per annum.* "*Art.* 5, *sec.* 3. No money shall be borrowed by the city "until the ordinance passed therefor shall be submitted to "and voted for by a majority of the voters of said city "attending an election for that purpose. Art. 10, sec. 20. "And also in accordance with a certain ordinance passed by "the city council of said city on the 15th day of June, A. D. "1869, entitled, '*An ordinance to provide for a loan for* "'*municipal purposes*,' which was ratified by a *majority* of all "the qualified voters of said city, at an election holden on "the 20th day of July, A. D. 1869, and in conformity with "an ordinance passed by the city council of said city on the "30th day of July, 1869, entitled, 'An ordinance to *carry* "'*into effect* the ordinance of June 15, 1869, *entitled*, '*an* "'*ordinance to provide for a loan for municipal purposes.*'"

The plaintiff alleges, that on the first of August, 1870, he became the purchaser of bonds numbered 41 to 61 inclusive, with the interest coupons annexed, at the city of New York, and for a valuable consideration; the non-payment of the one hundred coupons; and the refusal of the defendant to pay the same.

To this declaration the defendant below filed two special pleas. (Record 17 to 27.)

The first plea sets forth the ordinance of June 15, 1869, *in hæc verba* (Record 17–18) and also the ordinance of July 30, 1869 (Record 18–23) and then sets forth what is alleged to be the *substantial* privileges granted to the Ottawa Manufacturing Company, by an act of the general assembly of February 15, 1851, and an act amendatory thereof, passed February 16, 1865, and avers that the first act and amendatory act "were the same franchises and powers referred to in "the ordinance passed July 30, 1869, as having been granted "for 'that purpose' by the legislature of the State of Illinois, "under which said Cushman was *authorized and directed to* "*expend the proceeds* of the bonds aforesaid;" that the Manufacturing Company was a private corporation, not connected with or controlled by the city, and that the bonds were issued and delivered to Cushman as a donation to Cushman, or to the Company, to aid in the prosecution of a private enterprise, and were not issued for any municipal purpose whatever; that the issue of the bonds was without authority of law, and that the bonds are void.

The second plea is in all respects like the first except it avers that Cushman has failed to comply with his contract as provided by the ordinance of July 30, set out. (Record 18.)

To these pleas, and each of them, a general demurrer was filed by the plaintiff, which was overruled by the court below, by which the plaintiff abided, and for the alleged error of the court below in overruling the demurrer, and holding these pleas good, this case is prosecuted to this court.

On the part of the plaintiff in error, it is insisted (1) that the city had lawful authority to issue the bonds in question, and (2) that the city is estopped by the recitals upon the face of the bonds, to assert its want of authority to issue them.

BRIEF.

I.

By the act of the legislature of Illinois of February 10, 1853, incorporating the city of Ottawa (Laws of 1853, p. 296), general power is given "*to borrow money* on the credit of the "city and *to issue bonds therefor* and pledge the revenue of "the city for the payment thereof; provided that no sum or "sums of money shall be borrowed at a greater interest than "at ten per cent. per annum" (§ 3, Art. V). Among the enumerated powers conferred, authority is given by § 8 of the same article "*to provide the city with water, to erect hydrants* "*and pumps in the streets.*"

The general power to borrow money conferred by § 3 of Article V is coupled with this restriction only: "No "money shall be borrowed by the city council until the ordi- "nance passed therefor *shall be submitted to and voted for by* "*a majority of the voters of said city attending an election* "*held for that purpose*" (§20 Art. 10).

The first and last sections above quoted are set forth upon the face of the bonds.

The city, at and before the issue of the bonds, assumed that it had corporate power to issue them, and that they were issued for legitimate purposes—in fact, for municipal purposes. The people gave their sanction to this view of their

corporate power, by their vote to incur the indebtedness, and to issue the bonds as evidence thereof. This debt was not imposed upon them *in invitum*, but was assumed by them voluntarily. The purpose, to aid which the bonds were issued, was a public purpose, and no less so because it was to be accomplished through the agency of a private corporation. In that respect it was similar to aid voted to a railway or other private corporation, the promotion of which from its nature affects the general interests of the municipal community.

A reference to the ordinance of June 15, 1869, set out in the plea (Rec. p. 18), discloses that the object of the aid voted was not simply the advancement of the private interests of the Ottawa Manufacturing Company, but the bonds were to be issued and delivered to Cushman, "to develope the "*natural resources* of the surroundings of the city," and he is thereby directed to expend the same *under the franchises and powers granted*, or which *might* be granted by *the legislature* of the State *for that purpose*, in the manner which in his judgment should best secure the practical and permanent *use of the water power in the city* and its immediate vicinity, and then proceeds to provide in detail for the execution of a contract by Cushman for the faithful performance of the trust imposed upon him, in a certain manner and under certain restrictions, "so as to make available the water power of both "(the Fox and Illinois) rivers *at Ottawa*, as soon as the addi- "tional water power * * * can be brought into use by "being *leased at reasonable and fair rates* * * * as "rapidly as called for." It will be thus seen that the declared purpose was a public purpose, which was proposed to be pro-

moted, viz., to so utilize this water power that it could be used and leased at reasonable and fair rates, that is to say, it was to be made available to any and all persons who should desire to use it, whether for the purpose of running flouring mills or as a motive power for propelling machinery used for other manufacturing purposes or for domestic use.

By the 8th section of the act of 1851, referred to on page 23 of the Record (Private Laws of Ills. of 1851, pp. 179–180), the Ottawa Manufacturing Company is invested with the right to enter upon and flow lands, and to that end to exercise the *power of eminent domain* by the condemnation of property to the uses required, upon making compensation in damages, through the institution of the proper judicial proceedings, which of course, as held by this court in the Munn case (94 U. S. 113), subjected the corporation in a measure to the supervision of the legislature with reference to the manner in which its franchises and privileges should be exercised, and the imposition of tolls or charges for the use of the water power, as contemplated by section 2 of the act. (Record 23.) The 8th section of this act is not referred to in the pleas, but is a public act (see sec. 10), of which this court will take judicial notice.

Further, as bearing upon the question as to whether the issue of bonds by the city of Ottawa in aid of the Ottawa Manufacturing Company was a public or municipal purpose, the attention of the court is here called to the fact that the general assembly of Illinois, on the 19th of February, 1867 (Private Laws of Ills. of 1867, vol. 2, p. 350), two years prior to the issue of the bonds in question, passed an act

authorizing the city to subscribe $100,000 to the stock of this Manufacturing Company, and appointed commissioners to make such subscription on behalf of the city, and by section 2 of said act, the commissioners, in order to pay such subscription, were authorized to make, execute and dispose of the bonds of the city. Section 3 provides for the levy of a tax to pay interest on the bonds; and sections 4 and 5 particularly define the duties of such commissioners.

It is apparent: (1) that the legislature regarded this Manufacturing Company as a matter of public interest; (2) that the legislature authorized the city to subscribe to the capital stock of the corporation, and to issue bonds to pay said subscription; (3) that the city had *general power* to issue bonds *upon a vote of the people*, but under the restrictions contained in the city charter, no bonds could be issued without a vote of the people.

The contract with Cushman, as provided for in the ordinance set out in the pleas (Record p. 19) was that they were "to be used by him *under the franchises* and *powers* "*which have been granted for that purpose by the legislature* "*of the State*, or which *may hereafter be granted* for that "purpose."

It is true the bonds were not issued by the commissioners, but by virtue of the express provisions of the charter, full power was given to the municipality to borrow money and issue bonds upon a vote of the people. Under the provisions of the charter, while the commissioners might perfect the subscriptions and issue the bonds, they could *only* do this *upon a*

vote of the people, as provided by the charter, for the act authorizing the city to subscribe was in effect an amendment of the city charter in this respect, and did not assume to, nor did it by implication, repeal the restrictions contained in the charter as to the borrowing of money and issuing bonds.

The powers conferred upon Cushman by the ordinance were those of an agent or trustee of the corporation, to appropriate the bonds under the powers that *had* been or *thereafter might* be granted by the legislature; and to indemnify the city against any *misappropriation*, it was provided, "that said Cushman shall bind himself, that if said "work is not constructed as aforesaid, that he will return said "bonds to the city, or the value of the same, and save it "harmless from all loss on account of the same, or on account "of interest accruing thereon; and in case said work shall "not be completed by said Cushman, then to return a *pro* "*rata* share of said bonds, in the proportion that the cost of "the work constructed shall bear to the part of the work not "constructed." (Record p. 21.)

If, under the provisions of the act authorizing the subscription, the bonds were appropriated to the purposes of the corporation, and a liability thereupon arose on the part of the Company to issue to the city an equal amount of stock, the city has its remedy to enforce the delivery of it, if it has not already received it (*Hayes v. R. R. Co.*, 61 Ills. 422; *Ottawa & Oswego & Fox River R. R. Co. v. Black*, 79 Ills. 262); or if there has been any misappropriation of the bonds by Cushman as the agent of or trustee for the city, the city

has its legal or equitable remedy against Cushman under its contract with him, to make good its loss, if any.

The city issued the bonds in question under its general and indisputable powers conferred by its charter, and so affirms upon the face of the bonds; hence it is entirely immaterial, as against the plaintiff as a *bona fide* holder, whether Cushman made any lawful or unlawful or unauthorized appropriation of them. That is matter entirely between the city and Cushman, and if the existing legislation was not sufficient to or did not authorize the appropriation of these bonds, issued under the general municipal power of the city, which is alleged to have been made, and additional legislation was required to authorize Cushman to make such an appropriation of them as contemplated by the ordinance, and he appropriated the bonds *before* the additional legislation was procured, the city, as before suggested, has its remedy for the misappropriation under its contract. So this is simply a question between the city and Cushman, and cannot affect the plaintiffs' rights. The ordinance contemplates only a *lawful* appropriation of the bonds issued by the city under its unquestionable municipal powers; and if any unauthorized or unlawful appropriation of them was made, the city is abundantly protected; and it is apparent it meant to and did jealously guard against any appropriation except as lawfully authorized, or which might thereafter be lawfully authorized by the legislature.

According to its own showing by the pleas interposed, the defense of *ultra vires* is a mere afterthought, and a shamefully dishonest attempt of the city to avoid its legal obligations

and defraud its bondholders, rather than to seek its remedy, which is ample, against its own public servants and agents, for the breach of any public duty or trust, if any has been committed. It is by no means material to the determination of the question involved, whether the city issued its bonds in payment of a stock subscription under the act of the legislature authorizing it, or whether under the general powers contained in its charter. The distinction between a "donation" and a subscription being, as remarked by the Supreme court of Illinois, merely a shadowy one. The question is simply whether the general purpose of the corporation in aid of which bonds are voted is a *public purpose*, one affecting the general interests and property of the political community, or of a private character; if the former, and there is legislative authority for it, it is a corporate purpose.

In *Maher v. the city of Chicago*, 38 Ills. 273, the Supreme court of Illinois say: "If a municipal corporation "dealing with individuals *assumes* that it possesses certain "corporate powers, upon which the validity of its acts de- "pend, and it turns out that it does *not* possess the *specific* "power relied on, it is not thereby excused from the perform- "ance of its obligations, *if they can be performed through the* "*agency of other powers* which it does possess."

II.

But we submit that the city had undoubted power to issue its bonds in and of this Manufacturing Company, independent of the act of the legislature authorizing it to subscribe

to the capital stock of the Company as provideed for in the ordinances of the city. As has been before suggested, the issue of the bonds was not a "donation" to a *private* corporation, but was an *appropriation* in aid of a public improvement, which affected the interests of an entire community, and whereby it was sought to enlarge the *natural* advantages of the city and its surroundings by the development of the water power, and thus to aid in the establishment of flouring mills and other public enterprises, and to secure the use and enjoyment of these increased privileges upon reasonable terms and without unjust discriminations. It was not, primarily, the direct pecuniary interests of the Manufacturing Company, as a private corporation, that were sought to be promoted, but the *general* interests of the community, as is apparent from the ordinance (Record 17). It was a proper *municipal purpose*, which the city might promote through the agency of a private corporation; hence the provision, that the improvements shall be so completed as shall "best secure the practi-"cal and permanent use of said water power in the city and "its immediate vicinity, and that it should be leased at "reasonable and fair rates."

It was urged, however, in the court below, and held by his honor Judge Blodgett, that the issue of the bonds was in violation of § 5 of Art. 9 of the constitution of Illinois of 1848. This provision this court has frequently had occasion to consider; it is as follows: "The corporate authorities of "counties, * * * cities, etc., may be vested with power "to collect and assess taxes for corporate purposes; such "taxes to be uniform in respect to persons and property

"within the jurisdiction of the body imposing the same," etc.

There are certain objects which would be readily conceded not to be corporate purposes, and other objects which would be as readily conceded were corporate purposes, and still other objects, to determine the character of which in this regard, resort would necessarily be had to extraneous matters; and when the legislature has declared those of the latter class to be proper subjects of municipal aid by taxation and appropriations made for their promotion, the courts have ever refrained from assuming to judicially overrule the judgment of the legislature.

The Supreme court of Illinois, in *Taylor v. Thompson*, 42 Ills. 11 (in an opinion delivered by the learned counsel for the defendant in error, then one of the members of that court), says, "When, therefore, the legislature has authorized the "levy of certain taxes, and has thereby declared them to be, "*in its opinion*, taxes for *corporate purposes*, we should not "hold such taxes to be unconstitutional, *merely because their* "*corporate character admits of some debate.* A proper "respect for the legislative department of the government "requires us to regard its acts as *prima facie* constitutional; "* * * that the framers of the constitution deemed that "they had furnished *all* the safeguards that were necessary in "this behalf, when they provided for absolute equality of taxation; and that they thought it unwise to hamper the legislature by any restrictions as to either the subjects or "purposes of taxation, is evident from the sixth section of "the ninth article above quoted. That section provides that

"the specification of the objects and subjects of taxation "shall not deprive the general assembly of the power to "require other objects or subjects to be taxed. * * * "And who will deny that this was a wise abstinence on their "part, when we take into view the ever-varying emergencies "of society, and the rapid development and unforeseen needs "of our modern civilization?" The court then proceeds to determine that a tax imposed by the corporate authorities of a township to pay bounties to persons who should thereafter enlist or be drafted into the army, was constitutional within the meaning of the fifth and sixth sections of article nine of the constitution of the State.

The learned counsel (who himself delivered this opinion) insisted, upon the argument of this case in the court below, that it was entitled to no weight as authority, and was rendered simply in obedience to the exigencies of the times, which demanded a strained construction of the constitution, to further all efforts to suppress the war of the Rebellion. However this may be, and whatever may be said as to the propriety of the decision of the court in that particular case, *the definition* of the term "*corporate purposes*," as defined in the constitution, expressed in the opinion delivered, is a sound one, and one which has never been in any substantial degree overruled or qualified by any subsequent decision of that court, but on the contrary, has been subsequently endorsed and approved; and, with due respect to our learned friend on the other side, we submit that he is not now, while acting professionally, authorized to retract what he before judicially pronounced as the unanimous judgment of the Supreme court of the State.

In the case of *Burr v. the City of Carbondale*, 76 Ills. 455, a tax imposed by the city in support of the Southern Illinois Normal University, to which the people had voted aid under an act of the legislature, was held valid within the provision of the constitution above quoted, and that the aid being *so voted* the taxes were not imposed *in invitum* (Opinion p. 463), and Chief Justice Breese, in referring to *Taylor v. Thompson*, *supra*, says it was there "held to mean a tax to be expended in a manner which should promote the general prosperity and welfare of the municipality which levied it * * but in that case a *vote* of the people authorizing the tax was first to be taken, and the people, in fact, *voted* the tax. This was an important fact in determining that case. We thought it difficult to determine with precision what was a 'corporate purpose,' in the sense of the constitution, but came to the conclusion, that it was *such a purpose*, and such only, as might have a legitimate connection with objects and purposes promotive of the welfare of the municipality, and a manifest relation thereto." (Opinion p. 464.)

But the conclusive answer to the criticisms of counsel upon the doctrine of *Taylor v. Thompson*, is found in the fact that it has been expressly approved in numerous other cases, viz.:

Brisco v. Allison, 43 Ills. 291.
Johnson v. Campbell, 49 Ills. 316.
Misner v. Bullard, 43 Ills. 470.

And in *The Chicago, etc., R. R. Co. v. Smith*, 62 Ills. 227, the court say: "In *Taylor v. Thompson* this court defined "a *corporate purpose* to mean '*a tax to be expended in a*

"'*manner which shall promote the general prosperity and* "'*welfare of the municipality which levies it*,' *and the court* "*declares that the distinction between a donation and a sub-*"*scription is more shadowy than real—in fact, in the view of* "*the court is* '*entirely shadowy.*' "

In the court below the case of *Trustees, etc., v. The People*, 63 Ills. 299, was relied on. This was a proceeding to compel the issue of bonds by *school trustees* in aid of a railroad company. The power to issue the bonds was denied by the court, upon the ground that "*trustees of schools* are "not named in the constitution, and are not included in the "municipalities which may be vested with power to assess and "collect taxes" and not "'corporate authorities' within the "meaning of the constitutional provision."

And that court, in *The People v. Dupuy*, 71 Ills. 653–5, reiterated the doctrine that a distinction is to be made between those municipal corporations enumerated in the constitution, and *quasi* corporations not named, and which have no general municipal powers such as are possessed by towns and cities, and therefore limited in their powers of taxation to the precise purpose they are created to subserve; and the court in this case again recognized and approved the doctrine of *Taylor v. Thompson* (p. 655).

The doctrine of the case last cited was again pronounced in *The People v. Trustees of Schools*, 78 Ills. 136. By the foregoing cases, the difference between municipal corporations such as cities and towns, and *quasi* municipal corporations, such as school districts, etc., is well and clearly defined, viz.:

while the former have the *general* purposes of the political community to subserve, the latter are created solely for the furtherance of the *specific* objects named.

The power conferred by section 3 of the charter of the city, "to borrow money on the credit of the city, and to issue "bonds therefor, and pledge the revenue of the city for the "payment thereof," gives the unquestionable right to the city to borrow money for any "corporate purpose" within the meaning of the constitution. The right of cities, etc, to borrow money and issue bonds in aid of railroad enterprises, has been sustained simply for the reason that such aid in the establishment of public highways was deemed to be a corporate purpose; but that while such an indebtedness could not be imposed upon the political community *in invitum*, yet if the people were permitted to vote upon the question, and *did vote* to issue bonds under the law, they would be held valid.

The question as to whether the bonds in suit are valid, involves the question of the validity of commercial securities, which this court will determine for itself. They have never been held invalid by the State court, and we submit they are unquestionably sustainable as valid obligations under the constitution of the State. This court, in *Pine Grove v. Talcott*, 19 Wall. 666, said, "Questions relating to bonds issued in a "negotiable form, under an act of a State legislature, involv- "ing questions relating to commercial securities, and whether "under the constitution of the State, such securities are valid "or void, belongs to the domain of general jurisprudence. "This court will accordingly not follow the decisions of the "courts of the State where the bonds are issued, as to their

" validity and constitutionality under the laws and constitution " of the State, if the judges here disprove of those decisions."

The improvement, in aid of which the bonds in question were issued, was clearly one for the general benefit of the city, proposed to be effected through the agency of a private corporation; the object being to obtain an additional supply of water power, and to utilize it in any manner which would subserve the interests of the people; and by which it might be supplied at fair rates for any and all general purposes, whether to propel grist mills, flouring mills, saw mills, or other machinery used in connection with any other industrial interests. It is evident that the object of the creation of this corporation was not exclusively for the carrying on of a manufacturing business for its own private benefit, but it was expressly authorized to "*lease*" *the water power to others*, as provided by the ordinance of July 30, 1869 (Record pp. 19–20), *and the bonds were issued to secure these advantages to the general public*, and under a contract with Cushman, one of the corporators, whereby such a distribution of the advantages was provided for, and ample indemnity also provided for the fulfillment of this condition.

By section 8 of article 5 of the city charter, express power is given " to provide the city with water and erect " hydrants and pumps in the streets." Certainly no one will question but that this was a corporate purpose; nor can it be doubted that the city had ample power to contract with this corporation as well as with any private individual for such a supply of water for general purposes; nor can it be questioned that under the contract with Cushman the city had the

right to demand the leasing at fair rates of so much of the water power proposed to be created, as should be required to supply the hydrants in the streets, whether for domestic use or to maintain a system of waterworks for the extinguishment of fires. That such were legitimate public purposes—municipal purposes—will not be denied, and no doubt largely influenced the city to issue the bonds and enter into the contract set out in the plea. We confidently submit that the power of the city to issue the bonds for the above purposes cannot be seriously doubted.

That such were "public purposes" as defined by the decisions of the Supreme court of Illinois, in the cases cited, seems clear; that such powers fall within that class of powers the necessity for the execution of which, in the attainment of a public purpose, as said by the Supreme court of Illinois in *Taylor v. Thompson*, and *Burr v. The City of Carbondale*, *supra*, may be safely confided to the legislature to define.

In *Gelpcke v. City of Dubuque*, 1 Wall. 202, it was held, that the general power given by the charter "to borrow "money for any public purpose" was amply sufficient of itself to sustain the bonds, and "that where a corporation has "power under any circumstances to issue negotiable securi- "ties, the *bona fide* holder has the right to presume that they "were issued under the circumstances which give the requisite "authority, and they are no more liable to be impeached for "any infirmity in the hands of such holder, than any other "commercial paper."

The plaintiff in this case, in view of the express power given by the charter of the city, and of the recital upon the

face of the bonds (and even if the ordinance had been set out thereon) had, we submit, the undoubted right to assume that those bonds were issued for legitimate public and municipal purposes, and that they cannot be impeached in his hands.

In *Meyer v. City of Muscatine* (1 Wall. 390), the charter gave the city power to borrow money "for any object in its discretion, upon a vote of the people." When the bonds were issued, special acts were in force authorizing aid to railroads, but the bonds were issued under the general power given, and were sustained for the apparent reason that the object to be subserved was a public purpose, and so declared by the legislature, which, in connection with the charter, formed a complete answer to the alleged want of power to issue them.

See also *Rogers v. Burlington*, 3 Wall. 654, and *Mitchell v. Burlington*, 4 Wall. 270.

where the same doctrine is reiterated, and in the latter case the issue of the bonds was sustained, under a similar general provision of the city charter, in aid of a plank road.

The power conferred by the charter of the city of Ottawa is a general *unrestricted* power "to borrow money * * * "and issue bonds," which, under the rule laid down by this court, and under the decisions of the Supreme court of Illinois, will sustain bonds issued for any public purpose, and especially in aid of an object manifestly beneficial to the entire community, and *declared by the legislature to be a public purpose*, and authorized to be accomplished through the agency of a private corporation vested with the exercise of the power of eminent domain. It was earnestly contended on the trial in the court

below that the case of the *Loan Association v. Topeka*, 20 Wall. 661, was decisive of the case at bar, but we submit that there are no material points of resemblance in the cases. The Topeka case was purely an appropriation in aid of a private individual enterprise, not affecting the public interest further than would the establishment of any other private manufacturing enterprise. The distinction between that case and one of the nature of the case at bar, is very clearly illustrated by the opinion of this court in *Beasley v. Burlington*, 94 U. S. 312; but the case at bar is a much stronger one to sustain an appropriation in aid of a "public purpose" than is the Beasley case, for the reasons already suggested. If an appropriation in aid of a steam grist mill is an appropriation for a public purpose, certainly an appropriation in aid of an enterprise whereby water works for general domestic purposes, or strictly municipal purposes, or to promote the establishment of grist mills, flouring mills and other general objects of industry whereby these advantages are secured to an entire community, are none the less so.

The legislature having granted the franchises (including the right of the exercise of the power of eminent domain) to the Ottawa Manufacturing Company, under the decision of the case of *Munn v. Illinois*, 94 U. S. 112, has the undoubted right to regulate and control this Manufacturing Company in regard to the manner in which it shall exercise its franchises and privileges, not only in the exercise of the power of eminent domain in the acquisition of property, but in the imposition of tolls and charges for the use of its water power,

and to provide against unjust discriminations and impositions upon the public.

III.

The city is estopped by the recitals upon the face of the bonds, as against the plaintiffs, to deny that they are valid obligations, and issued for proper purposes under its charter.

Under the provisions of the charter relating to the power of the city to borrow money and issue bonds, ample legislative power for the issue of the bonds is found. The recitals show a strict compliance with the provisions of the charter; that they were issued in pursuance of the express power given by section 3 of Article 5, and section 20 of Article 10, and in pursuance of an ordinance passed June 15, 1869, entitled "*an ordinance to provide for a loan for municipal purposes*," and ratified by an election held on the 20th of July, 1869, and in conformity with an ordinance passed July 30, 1869, entitled, "an ordinance to *carry into effect the ordinance of* "*June* 15, 1869, entitled '*an ordinance to provide for a loan* "*for municipal purposes.*' "

A more clear and explicit recital of legislative authority and compliance therewith cannot well be imagined. Upon the faith of these recitals, and the charter of the city, the bonds and coupons in question were purchased. The recitals were, and doubtless were intended to be, such an affirmation on the behalf of the city, of its authority to issue the bonds, as to assure their negotiability in any commercial market where such securities are bought and sold.

By the charter, the body to determine when the necessity should arise for a loan of money and the issue of bonds for "*municipal purposes*" was the city council, who were authorized to issue them, provided the people sanctioned their issue by a vote. They, upon the face of the bonds, say, "the "exigency has arisen requiring a loan of money *for municipal* "*purposes*, and the issue of bonds as contemplated by the "provisions of the charter, and we have submitted the ques- "tion to the people, and they have ratified it and sanctioned "our action authorizing a loan of money for *municipal pur-* "*poses;* and we solemnly affirm that in pursuance of the "power given us by the charter, *and for municipal purposes*, "we have issued these bonds, and caused these recitals of our "power to be thus stamped upon the face of the bonds, and "verified them by the signatures of the mayor, and city clerk "and corporate seal of the city, and we assure the commercial "world that it may implicitly rely on these recitals, and safely "purchase these securities."

In view of the unquestioned legislative power for the issue of the bonds, and the recitals upon the face of them, their repudiation by the city is simply a most audacious and shameless attempt to defraud innocent purchasers, and among the numerous cases involving the liability of municipalities which have come before this court, it is doubted if its parallel can be found.

From the decision in *Knox Co. v. Aspinwall* (21 How. 539), down to the present time, this court has had the subject of the effect of recitals under consideration, under almost every conceivable view in which the subject can be considered;

but it was insisted by counsel for defendant that the recitals in this case charged the plaintiffs and all others who purchased them with constructive notice that they were not (as they assume) issued for municipal purposes.

It is here proposed to refer to some of the numerous decisions of the court upon the subject, by way of illustration, simply to establish the proposition contended for on behalf of the plaintiffs, viz.: that the defendant is, by the recitals upon the face of the bonds, estopped to assert their invalidity as against the plaintiffs as legal representatives of the purchaser.

In *Bissell v. the City of Jeffersonville*, 24 How. 287, the city was authorized to issue bonds in aid of a railway, provided three-fourths of the legal voters *petitioned* for it; the bonds recited that three-fourths of the legal voters had so petitioned, and that they were issued by authority of the common council. This recital was in substance and effect this: That a *reference* to the *records* of the city council would show that the bonds were issued upon a *petition signed by three-fourths* of the legal voters, and if the purchaser was chargeable with constructive notice of the contents of the records of the city, he was, of course, chargeable with notice that such a petition was not filed, if such were the fact; but the court held that it was not competent to contradict the recital in the bonds by the production of the record.

In *Van Hostrop v. City of Madison*, 1 Wall. 291, the city was authorized to subscribe, upon a like condition; the bonds contained a like recital, and purported to be issued by virtue of an ordinance of the city. The records did not purport to show any petition signed by three-fourths of the *legal*

voters, as required by the statute, but simply that the citizens had petitioned "with great unanimity." The recital in the bonds was held to conclude the city.

In *Warren Co. v. Hackett*, 1 Wall. 83, the act of the legislature authorized the issue of the bonds, "subject to the "following *restrictions, limitations and conditions, and in no* "*other way whatever*, viz. * * * *after* and *not before* the "amount shall have been designated, advised and recommended "by a grand jury of the county." Here then, was the absolute source of power in this instance; the bonds recited that they were issued in compliance with the act; as stated by the court in its opinion, it was "proposed to show the recitals in the "bonds were not true. * * * We have decided in the case "of the *Commissioners of Knox Co. vs. Aspinwall*, that when "bonds on their face *import* a compliance with the law under "which they were issued, the *purchaser is not bound to look* "*further*."

In *St. Joseph's Township v. Rogers*, 16 Wall. 644, this court says, "Power to issue bonds is * * * frequently conferred * * * in a special manner, or subject to certain regulations, conditions or qualifications, but it appears from the recitals that the bonds were issued in conformity to the regulations, and pursuant to those conditions and qualifications. *Proof that any of these recitals were incorrect* will not constitute a defense."

In *Supervisors v. Schenck*, 5 Wall. 772, it is held that when a corporation has power *under any circumstances* to issue bonds, as against a *bona fide* purchaser, it must be assumed that they were rightfully issued.

In *Grand Chute v. Winegar*, 15 Wall. 356, it is said, "if there is legislative authority for the issue of the bonds," the corporation "cannot show a want of compliance with the "forms of law or *fraud* in their own agents."

It is submitted that the city of Ottawa, under the rule laid down in the last cited case, cannot be permitted to show that its officers, after having recited upon the face of the bonds that they were issued by virtue of its charter, and under an ordinance "to provide for a loan for municipal pur- "poses," and after an election held in pursuance of the express provision of the charter, that the recitals are untrue, and thus avail itself of the fraudulent acts of its own officers, who by the law were authorized to certify these facts.

In *The Town of Coloma v. Eaves*, 92 U. S. 484, the doctrine of the preceding cases is most emphatically endorsed, and after citing sec. 419 of Dillon on Municipal Corporations, which is characterized as a very *cautious* statement of the doctrine, it is held, that when authority is given to a municipal corporation or its officers to issue municipal bonds, but only on some precedent condition, and those officers are authorized to verify this act, the recital in the bonds showing such compliance is *conclusive* as against a *bona fide* purchaser, "for the "recital is itself a decision of the fact by the appointed "tribunal," citing *Bissell v. Jeffersonville, supra.* In *Coloma v. Eaves, supra*, the statute required that *a majority vote should be made to appear by the statement of the town clerk filed with the county clerk.*

This was the basis of the power to issue the bonds, in that case. It was proposed to be shown, by the production of the

records, that the provision of the statute had not been complied with, and thus contradict the recitals, but this court held that the *bona fide* holder of the bonds was only chargeable with notice of the statute, but was not bound by the existence of anything *in pais*, and held the recitals conclusive. So in the case at bar, the plaintiff was of course chargeable with notice of the provision of the city charter, he had the right to assume from the recitals in the bonds, that what was therein stated was true, viz., that the bonds were issued in pursuance of the charter, and for *municipal purposes only*. The same degree of liability on the part of the city must attach with reference to the acts of its officers, acting in its behalf, in the issue and negotiation of its commercial paper, as would attach to any private person or corporation for the acts of its own agents under like circumstances. If the agent of a private corporation should present a certificate signed by its president and secretary, and under the seal of the corporation, certifying that on a certain day and for a certain lawful purpose a resolution was adopted authorizing the issue of bonds, and upon the faith of which money was obtained, the corporation could not for a moment be heard to say that the purchaser of its securities under such circumstances was chargeable with "constructive" notice that the resolution represented to have passed, and appearing upon its records, was for a different and unauthorized purpose.

In *Marcy v. Oswego*, 92 U. S. 637, it was proposed to show from the public records an *over issue* of bonds in violation of the statute. The bonds contained a recital that they were issued "in virtue of and in accordance with" the statute,

and "in pursuance and in accordance with a vote of three-"fifths of the voters of the township," but in accordance with the doctrine of the foregoing cases, the town was held bound by the recitals in the bonds, made by its own officers, to whom was delegated the power to issue them under the law. The doctrine of this case was again expressly approved in *Humbolt v. Long*, 92 U. S. 642, and in *Commissioners v. January*, 94 U. S. 206.

In *The County of Moultrie v. Savings Bank*, 92 U. S. 631, it was proposed to show that the bonds were issued subsequent to the adoption of the new constitution in 1870, and therefore void, under the prohibition therein contained, instead of prior thereto, as recited upon the face of the bonds. This was proposed to be shown by the public records, but this court said, "after having assured a purchaser that their sub-"scription was made in December, 1869, *when they had* "*had power to make it*, it would be tolerating a *fraud* to "permit the county to set up, when called upon for payment, "that it was *not* made until July 2, 1870, *when their* "*authority expired.*"

The case last cited affords a very apt illustration of the great injustice proposed to be perpetrated by the city authorities of Ottawa upon the plaintiff in the case at bar. The city had unrestricted legislative authority by its charter to issue bonds upon a vote of the people. It is recited upon the face of the bonds that they are issued in pursuance of this provision of the charter. And to disarm all suspicion, they affirm in the most solemn manner that the bonds were issued in pursuance of an ordinance passed "to provide for a loan

"for municipal purposes," and of another ordinance to *carry into effect* the former ordinance "to provide for a loan for "municipal purposes." Now, it is, in substance, said by the pleas in this case, "it is true we had the statutory power to "borrow money and issue bonds, but the bonds were *not* "issued for municipal purposes, and what we represented is "not true, but we confidenced you out of your money, and "we propose to keep it."

It is believed that this court will not sanction such a shameless fraud.

In this connection see also

Cromwell v. County of Sac, 96 U. S. 51.
Commissioners v. Bolles, 94 U. S. 104, and
Warren Co. v. Marcy, manuscript opinion.

It was strenuously urged by counsel on the other side, on the trial of the case in the court below, that because the recitals in the bonds refer to the *ordinances* of June 15 and July 30, therefore the purchaser was chargeable with constructive notice of the contents of those *ordinances*, and hence with knowledge (as is assumed on behalf of the defendant) that the ordinances were not to aid a municipal purpose, but a private enterprise, which is inhibited by the constitution. It is true there are some decisions of the State courts to that effect, but within the principle embodied in a long series of decisions of this court, we fail to find any endorsement of this view. It is urged by counsel for the defendant that there are some peculiar and significant intimations given by a reference to the *ordinances*, upon the face of the bonds, relative to the power of the city, of which the purchaser is bound to take

notice, which would not apply to a recital in the bonds of *any other record* of the acts and proceedings of the city council pertaining to their issue; and therefore, that these bonds are assailable under the the decisions of this court. Wherein this distinction exists, we submit is not apparent; that such a distinction is a "distinction without a difference," and altogether imaginary, and a mere sentimentality.

In the case of bonds issued by a town, there is no reference to an ordinance, for towns adopt no ordinances; their official action, is not ultimately and completely evidenced by an ordinance. They have no representative body to authenticate their official acts by ordinances, as a city has, but their official acts are evidenced by the *records* of their proceedings, kept by those municipal officers who are by the law charged with that duty; but the *records* of the official acts of a *township* are of *equal solemnity* with those of a *city*. When the proper authorities of a town recite upon the face of a bond, that it is issued upon a vote of the people, that an election was called upon a petition signed by "three-fifths" of the legal voters, to be held on a certain day, in pursuance of the statute, that an election was held on that day, and that a majority of the legal votes cast were in favor of the issue of bonds, and that certain specific provisions, upon a compliance with which, *only*, were the town authorities authorized to issue the bonds, have been complied with, as against a *bona fide* purchaser of the securities, these recitals are held, of themselves, to import absolute *verity*, and why? For the simple reason and *none other* than that *such authentication* of the necessary *official acts* of the town is regarded as neither more nor less than

a declaration that these matters appear from the *public records* of the town.

What possible distinction can exist between a recital in the bonds issued by a city, that they were issued in pursuance of an act of the legislature and an ordinance providing for an election to provide for a loan for municipal purposes, as authorized by the statute referred to, and the case of a recital in a bond issued by a town, that a petition was filed, an election called, a vote taken, and other acts done, *all of which are necessarily matters of record if they exist in fact?*

We submit there can be none. This court has uniformly held that the purchaser of such securities is not chargeable with constructive notice of the public records of the municipalities, and that the town is estopped, as against a *bona fide* purchaser, to show that the recitals in its bonds are untrue, or that its officers have been guilty of fraud.

The fallacy of the reasoning of our adversaries is, that they treat the *ordinance* as the *source* of power; whereas the *source of power* is the *statute*—the charter of the city. And when there is statutory power under any circumstances (as said in *Supervisors v. Schenck*, *supra*), for the issue of such securities, they will be sustained in the hands of a *bona fide* holder.

And such is the decision of this court in the recent case of *San Antonio v. Mehaffy*, 96 U. S. 313, reaffirming (explicitly) the rule in *Schenck v. The Supervisors*, and holding that "the city is estopped by the recital on the face of the "securities to deny its verity. A *bona fide* purchaser had a

"right to regard it as true, and *was not bound to look* "*further.*"

Judge Dillon, in his recent work on Municipal Bonds, after a very careful review of the authorities on the question, says (p. 33): "These cases afford a more striking illustration "than any previously decided by that court, that the pur- "chaser may implicitly rely upon the recitals in the bonds "made by the proper officers, *that the authority to issue them* "*has arisen.* And that he is *under no obligation to consult* "*the records of the municipality, and is not charged with* "*constructive notice of their* CONTENTS * * * where "the facts would have *shown* the bonds to have been *illegal* "were matters *appearing on the public records of the* "*township.*"

See *Mealey v. St. Clair Co.*, 3 Dill. 163.
Allen v. Cameron, 3 Dill. 175.
Wyatt v. City of Green Bay, 1 Bissell 292.

For the foregoing reasons, it is respectfully submitted that the judgment in this case should be reversed and the cause remanded, with instructions to the court below to render judgment for the plaintiffs upon the demurrer to the defendant's pleas, and assess the plaintiffs' damages.

G. S. ELDREDGE,

For Plaintiffs in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1878.

WILLIAM H. HACKETT, FRANK W. HACKETT, and ROBERT C. PIERCE, Executors of the last Will and Testament of WILLIAM H. Y. HACKETT, deceased, *vs.* Plaintiffs in Error,

THE CITY OF OTTAWA, Defendant in Error.

Writ of Error to the Circuit Court of the United States, for the Northern District of Illinois.

Brief and Argument for Defendant in Error.

Lawrence, Campbell & Lawrence,
AND
Charles Blanchard,
ATTORNEYS FOR DEFENDANT IN ERROR.

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1878.

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vs.

THE CITY OF OTTAWA, Defendant in Error.

Writ of Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF OF THE ARGUMENT.

I.

IN THE ABSENCE OF EXPRESS AUTHORITY FROM THE LEGISLATURE, THE CITY COULD NOT ISSUE THESE BONDS.

AUTHORITIES.

Town of South Ottawa v. *Perkins*, 4 Otto, 262.
Pendleton County v. *Amy*, 13 Wall., 297.
Kennicott v. *Supervisors*, 16 ib., 452.
St. Joseph Township v. *Rogers*, ib., 644.
Township of Coloma v. *Eaves*, 2 Otto, 484.
Bissell v. *City of Kankakee*, 64 Ills., 251.
The City of Galena v. *Corwith*, 48 ib., 423.
Trustees &c., v. *McConnel*, 12 ib., 138.

Marshall Co. v. *Cook*, 38 ib., 44.
Schuyler Co. v. *The People*, 25 ib., 181.
Supervisors, &c. v. *Clark*, 27 ib., 305.
Rogers v. *Burlington*, 3 Wall., 665.
Mitchell v. *Burlington*, 4 ib., 273.

II.

EVEN IF EXPRESS AUTHORITY HAD BEEN GIVEN TO THE CITY OF OTTAWA BY THE LEGISLATURE TO ISSUE BONDS AS A DONATION TO THE OTTAWA MANUFACTURING COMPANY, SUCH ACT OF THE LEGISLATURE WOULD HAVE BEEN VOID UNDER THE CONSTITUTION OF ILLINOIS.

AUTHORITIES.

Loan Association v. *Topeka*, 20 Wall., 655.
Harward v. *St. Clair Drainage Company*, 51 Ill., 133.
The People v. *Salomon*, ib., 48.
The People ex rel. McCagg v. *The Mayor, &c., of Chicago*, ib., 17.
The People v. *Dupuyt*, 71 ib., 653.
Johnson v. *Campbell*, 49 ib., 317.
Madison County v. *The People*, 58 ib., 463.

III.

THE BONDS IN QUESTION WERE NOT ISSUED FOR A CORPORATE PURPOSE.

Loan Association v. *Topeka*, 20 Wall., 65.
Board of Supervisors v. *Werder*, 64 Ill., 427.
Bissell v. *City of Kankakee*, ib., 251.

IV.

THERE IS NO QUESTION IN THIS CASE OF INNOCENT PURCHASERS OF NEGOTIABLE PAPER, FOR TWO REASONS: FIRST, THE BONDS WERE ISSUED WITHOUT STATUTORY AUTHORITY, AND FOR A PURPOSE FOR WHICH NO STATUTE AUTHORITY WOULD HAVE BEEN AVAILING; AND, SECOND, THE BONDS SHOWED THIS DEFECT ON THEIR FACE.

AUTHORITIES:

Township of East Oakland v. *Skinner*, 4 Otto, 258.

Township of South Ottawa v. *Perkins*, ib., 269.

Marsh v. *Fulton County*, 10 Wall., 683.

McClure v. *Township of Oxford*, 4 Otto, 432.

ARGUMENT.

This was an action brought upon the interest coupons of certain bonds issued by the City of Ottawa in the State of Illinois, being [redacted] The defendants pleaded, and the plaintiff demurred to the pleas. The case was submitted on demurrer, and the demurrer was overruled. The plaintiff abiding by his demurrer, final judgment was rendered for the defendant, and the plaintiff sued out a writ of error.

The record discloses the following facts as set forth in the pleas.

On the 15th of February, 1851, an act of the General

Assembly of the State of Illinois took effect, entitled "An "act to authorize certain persons to construct a dam across "Fox River for hydraulic and manufacturing purposes." It will be found on page 178 of a volume entitled "Laws of Illinois, 2d session 1849 and 1851," the volume including both the public and private laws of 1851, and this act being found on page 178 of the private laws. The plea sets forth the creation of a corporation by the first section of this act, to be called the "Ottawa Manufacturing Company," to consist of Wm. H. W. Cushman and certain other persons named in said section; and also sets forth in terms the second section defining the powers of the corporation. These are the only sections bearing upon the present controversy, and the only sections set up in the plea.

The first section, as already stated, creates the corporation. The 2d section is as follows:

"The said company when formed are hereby author- "ized to build a dam across Fox River, on section eleven "(11) or twelve (12) in township thirty-three (33), North "of Range three (3) East, in LaSalle County, for the pur- "pose of creating a water power; and the said company "may use, lease, or otherwise dispose of the same, and "may construct such other works, buildings, and machine- "ry as may be deemed necessary or proper, to use such "water, and to promote the interests and objects of the com- "pany."

What we especially desire to bring under the attention of the court in this section is, the provision that the company is formed "for the purpose of creating a water "power," and that the company "may use, lease, or oth- "erwise dispose of the same * * * to promote "the interests and objects of the company."

The company thus created was a strictly private corpo-

ration, whose business was to be conducted merely for the interests of the company. It was a manufacturing company, authorized to build a dam across Fox River, and thus create a water power, with the right to "use, lease, "or otherwise dispose of the same," as the interests of the company should dictate.

The Legislature, in January, 1865, passed another act in amendment of the foregoing, which amendatory act is set out in full in the second plea, and is to be found on page 551 of the private laws of 1865. This act authorized the manufacturing company created by the preceding act to build a dam across the Illinois River, as well as Fox River, and to construct a race from one river to the other.

It does not appear by the record what steps were taken by the company under these two acts; but, as shown by the plea, on the 15th of June, 1869, the City Council of Ottawa passed an ordinance authorizing the mayor to borrow sixty thousand dollars "for the use of said city, to "be expended in developing the natural advantages of the "city for manufacturing purposes," and to issue bonds therefor.

That ordinance was entitled "An ordinance to provide "for a loan for municipal purposes," and was as follows:

"*Be it ordained by the City Council of Ottawa:*

"That the Mayor of the city be, and he is hereby au- "thorized to borrow in the name of the city, at a rate of "interest not exceeding ten per cent., the sum of $60,000, "for the use of said city, to be expended in developing "the natural advantages of the city for manufacturing "purposes: and that bonds of the city be issued therefor, "in sums of five hundred dollars, with interest payable "annually, said bonds to be payable, one-third in five "years, one-third in ten years, and one-third in fifteen

" years after the date thereof; Provided that no applica-
" tion shall be made of the proceeds of said bonds, except
" for the purpose aforesaid, and in pursuance of an ordi-
" nance to be duly passed for that purpose, by the city
" council, nor until the faithful application of the pro-
" ceeds of such bonds, to the purpose aforesaid shall be
" fully secured to the city.

" Sec. 2. Be it also ordained that a sufficient sum, to
" pay the interest on said loan, shall be annually provided
" by taxation, and set apart as a separate fund, and to be
" applied to the payment of the interest on said bonds,
" and for no other purpose.

" Sec. 3. This ordinance shall be submitted to the
" voters of the city to be voted for or against at an elec-
" tion to be held for that purpose on the 20th day of July,
" A. D. 1869. The manner of the determination shall be
" by depositing ballots upon which shall be written or
" printed, 'For the loan Ordinance, or against the loan
" Ordinance.'"

On the 30th day of July, 1869, the City Council passed another ordidance entitled: " An ordinance to carry into " effect the ordinance of June 15th, 1869, entitled 'An or- " dinance to provide for a loan for municipal purposes.'"

This ordinance after reciting the vote of the city in favor of the former ordinance, authorized the Mayor to issue bonds to the extent of $60,000, to be used by him in improving the water power in the Illinois and Fox rivers within the city, and in the immediate vicinity thereof, under the franchises and powers granted for that purpose by the Legislature of the State. The ordinance is set forth at length in the plea, and is as follows:

" Whereas, By an ordinance passed by the City Coun-
" cil the 15th day of June, 1869, it was provided that the
" Mayor of the city should be authorized to borrow, in

"the name of the city sixty thousand dollars to be "expended in developing the natural advantages of "the city for manufacturing purposes, and to issue the "bonds of the city therefor; and whereas, it was provided "by said ordinance that the same should be submitted to "the voters of the city to be voted for or against at an "election to be holden for that purpose on the 20th day "of July, 1869: and whereas, at said election the said or- "dinance was ratified by the voters of the city, by a ma- "jority of 823 votes, being a majority of the legal voters "of the city:

"Now therefore, be it ordained by the City Council of "the city of Ottawa: That the bonds of the city for sixty "thousand dollars, be issued by the Mayor in accordance "with the terms and conditions of said ordinance of June 15, "1869, and that he deliver the same to William H. W. "Cushman, to be used by him in developing the natural re- "sources of the surroundings of the city, and that the said "Cushman is authorized, and directed to expend the same "in the improvement of the water power upon the Illinois "and Fox rivers, within the city, and immediate vicinity "thereof under the franchises and powers which have been "granted for that purpose by the legislature of the State, or "which may hereafter be granted for that purpose, in the "manner which in his judgment shall best secure the prac- "tical and permanent use of said water power in the city "and its immediate vicinity, provided that said Cushman "shall execute, and deliver to the Mayor an agreement "from him to the city of Ottawa, that he will, without un- "reasonable or unnecessary delay cause a good, substantial "and sufficient dam to be constructed across the Illinois "river above the city, to bring into use all the available "water power of said river at Ottawa, and will construct "sufficient head and tail races to make such power available, "said races to be constructed and continued to the Fox

"river below the aqueduct, and above the islands in Fox "river, as fast as the said water power can be leased at fair, "and reasonable rates, and be brought into actual operation, "and that he will also erect a good, substantial and suffi- "cient dam across Fox river so as to make available the "water power of both rivers at Ottawa, as soon as the ad- "ditional water power, created by such dam across Fox "river can be brought into actual use by being leased at "reasonable and fair rates, so as to have all the available "water power of both rivers at Ottawa ready for use as "rapidly as called for, and provided also that said Cushman "shall bind himself that if said work is not constructed as "aforesaid, that he will return said bonds to the city, or the "value of the same, and save it harmless from all loss on "account of the same, or on account of interest accruing "thereon, and in case said work shall not be completed by "said Cushman then to return a *pro rata* share of said bonds "in the proportion that the cost of the work constructed "shall bear to the part of the works not constructed, "provided that at least one of the dams above mentioned "with the races necessary to make the water power there- "by created available for practical use shall be completed, "or the whole of said bonds shall be returned to the city by "said Cushman.

"The intent of this ordinance being to secure the im- "provement, and development of said water power in the "city by appropriating the loan obtained under the ordi- "nance aforesaid for that purpose or *pro rata* so far as said "water power shall be made available for practical use."

The Court will observe that the ordinance reserves no interest to the city, or to the public, in the proposed water power, in consideration of the donation of the bonds, but leaves the property thus created entirely under the control of the company to which the Legislature had given the right of damming the two rivers, to be owned and used,

leased or sold by them, like any other private property. The city council gave Mr. Cushman sixty thousand dollars in bonds to be used in the business of his company, the only public benefit being such incidental advantage as might accrue to the city from the increase of business arising from a possible increase of manufactures. But the city had no property in the proposed water power, and the public had no right to its use, except as it should be bought from Mr. Cushman and the "Ottawa Manufac-" turing Company," on such terms as they might dictate.

These bonds were issued under this ordinance, and delivered to Mr. Cushman. The present suit involves their validity.

We insist that the judgment of the Circuit Court was right in holding that these bonds were *ultra vires*, and created no obligation against the city.

Our first point in support of this proposition is as follows :

I.

In the absence of express authority from the Legislature, the city could not issue these bonds.

The 1st plea avers that "the said Ottawa Manufacturing "Company was a private corporation, organized for private "business ends solely, and in no way connected with or con-"trolled by the defendant municipality; and that said "bonds so issued and delivered by said defendant munici-"pality to said Cushman was in all respects a simple do-"nation to said Cushman, or to said Ottawa Manufactur-"ing Company, to aid him or it in prosecuting a private "enterprise set forth in the aforesaid ordinances passed by

"the city council aforesaid, and were not issued for any "municipal purpose whatever."

This averment of the plea is admitted by the demurrer. Besides, its correctness is shown by the act of the Legislature, above quoted, creating the company and granting it its franchises, and by the ordinances authorizing the issue of the bonds. The city did not even retain for its own use any interest in the water power to be created by the proceeds of these bonds, and the bonds were, in fact, as stated in the plea, an absolute donation to Cushman, or to the company in which he was the chief corporator, for the purpose of creating a valuable property, to be wholly owned and controlled, at their entire discretion, by him or his company.

Could the city do this? We concede it possessed, under its charter, a power to borrow money, given to it for the purpose of enabling it to execute its municipal functions, and power to issue bonds for money thus borrowed. But the donation of money to an individual, or to a private corporation, in order to create a water power for the benefit of such individual or company, is certainly not, in any sense, a municipal function. If a city can be authorized by the Legislature to create a debt of this character, and levy taxes for its payment, it can be so authorized only by an express grant of power. It is too plain to be controverted that no such grant of power lurks under a general authority to issue bonds for municipal purposes.

In the case of *Town of South Ottawa* v. *Perkins*, 4 Otto, 262, the contention was as to the validity of bonds issued by the municipality in aid of a railway designed to pass through the town.

The court, speaking through Mr. Justice BRADLEY, says:

"The only authority claimed for issuing these bonds is

"the act referred to in the above recital therein. If no "such act was ever passed by the legislature of Illinois, "the bonds are void. A municipal corporation can not "issue bonds in aid of extraneous objects without legisla- "tive authority, of which all persons dealing with such "bonds must take notice at their peril."

The court cite

Pendleton County v. *Amy*, 13 Wall., 297.
Kennicott v. *Supervisors*, 16 *ib.*, 452.
St. Joseph Township v. *Rogers*, 16 *ib.*, 644.
Town of Coloma v. *Eaves*, 2 Otto, 484.

In the dissenting opinion the minority of the court does not depart from the principle enunciated by this extract, but expressly affirms it. In that opinion, it is said: "the "purchasers of these bonds were bound to read the "statute under which they were issued, but they were not "bound to do more."

In *Pendleton County* v. *Amy*, 13 Wallace, 304, the court, speaking through Mr. Justice STRONG, uses the following language:

"Without legislative authority, a municipal corporation, "like a county, may not subscribe to the capital stock of "a railroad company, and bind itself to pay its subscrip- "tion, or issue its bonds in payment; and if it does, the "purchaser of such bonds is affected by the want of "authority to make them."

* * * * * * * * *

"A purchaser is not always bound to look further than "to discover that the power has been conferred, even "though it be coupled with conditious precedent."

The principle running through all the decisions is, that no municipal bonds, issued for other than municipal purposes, are valid, unless there is a legislative grant of power to issue bonds for the purpose for which the issue was

made, but when such grant has been made by the legislature, and the bonds have been issued, reciting a compliance with the statute, and are in the hands of innocent purchasers, they can not be defeated by showing a non-compliance with some requirements of the statute intended to be conditions of the issue. It is not enough that the corporation has a general power to issue bonds for municipal purposes. There must be power to issue them for the particular purpose, and if there is no such power, the bonds are invalid, whether in the hands of an innocent purchaser or not. The original question of power to issue for the purpose for which they were issued, is always a subject of inquiry, and if the power does not exist, the bonds must fall.

That is not only the rule of this court, but it is the rule of the Supreme Court of Illinois as well. The question has been often before them, and always decided in the same way.

In *Bissell* v. *City of Kankakee*, 64 Ills., 251, decided in 1872, a question identical in principle with the question presented by this record, was before that court. In that case, as in the present, the City of Kankakee had issued its bonds to a manufacturing corporation called the "Douglas Linen Company," to assist it in the establishment, in the town, of a manufactory of linen fabrics. The bonds, as in the present case, were issued as a donation.

The city refused to pay, and suit was brought. The defense of "*ultra vires*" was set up.

It was urged on behalf of the bond-holders, as it probably will be here, that the city had a general power to issue its bonds for municipal purposes, and that these bonds were in the hands of innocent purchasers who had no notice of the want of authority to issue them. The legislature had given no special power to issue bonds for the purpose for which this issue was made. The court said :

"It is not pretended that the city had any special "authority, under any act of the legislature, to issue the "bonds which are the subject of this action."

"The right to recover is based on the ground that a "municipal corporation has a general power incident to "all such corporations, as held by this court in

The City of Galena v. *Corwith*, 48 Ill., 423,

"to issue bonds for any indebtedness; and on the further "ground that the appellants, who were alleged to be the "innocent holders of these bonds, had no notice of the "want of authority on the part of the city to issue them.

"We do not think either ground assumed can be main- "tained.

"The bonds were not issued by the city in liquidation of "any previous indebtedness, as were the bonds in Cor- "with's case, *supra*, and hence that case and the others "cited can have no application.

"This was not borrowing of money for municipal pur- "poses, or the payment of any indebtedness, but simply "a donation to 'The Douglas Linen Company,' to enable "it to embark in the manufacture of linen fabrics in that "city.

"The legislature had never conferred upon that city "any power to make donations for such purposes. It "was held, in *Trustees, etc.* v. *McConnel*, 12 Ill., 138, that "a municipal corporation, being a mere creature of the "law, can only exercise such powers as are conferred upon "it by the act creating it. Manifestly, therefore, the acts "of the officers of the City of Kankakee, in issuing the "bonds for the purpose of making a mere donation to "'The Douglas Linen Company,' were *ultra vires*. No "warrant for their action can be found in the city char- "ter, or in any act of the legislature."

"This is not a case where there has been an irregular "or defective execution of a power in issuing bonds by a "corporation having lawful authority to do so, but here "there is a total want of authority, and hence the bonds "are absolutely void. *Marshall Co.* v. *Cook*, 38 Ill., 44; "*Schuyler Co.* v. *The People*, 25 Ill., 181; *Supervisors*, "*etc.* v. *Clark*, 27 Ill., 305.

* * * * * * * *

"The authority of a municipal corporation to issue "bonds is derived from public laws, and the avenues to "information in regard to the law and ordinances of such "corporations being open to public inspection, the holder "of such securities will be presumed to have examined "them, and to have known whether the corporation had "the requisite power to issue the bonds. He has no such "opportunity in regard to private corporations. Their "by-laws are not open to inspection by those who deal in "securities issued by them, and hence the reason for the "distinction that has been taken.

"The holder of the bonds involved in this action had "every opportunity to know whether the city had any "lawful right to issue them, for the reason that its au-"thority, if any existed, was to be found in public stat-"utes, and if they did not in fact examine, as was their "privilege to do before buying, they will be presumed to "have done so, and to have known that they were issued, "without authority of law, and therefore void in the hands "of any holder, either with or without notice.

"The pleas presented a full and complete defense to the "bonds in the hands of the appellant, and the demurrer "was properly overruled."

It seems to us counsel can hardly claim with seriousness, in the face of these authorities, that a general power in the charter to borrow money and issue bonds therefor,

which would only be a power to borrow money for the purpose of carrying into effect the other powers granted by the charter for the city government, that is, a power to borrow for municipal purposes, can be construed as a power to issue bonds, without consideration, to a private manufacturing corporation. The city could borrow money for the purpose of enabling it to perform the duties and functions imposed upon it, as a municipal government, by its charter. For money thus borrowed it could issue its bonds. But it could not borrow money to aid in a work not municipal in its character. It could not borrow money to enable it to build and conduct a hotel, or to engage in trade, or in manufactures, and issue its bonds therefor, and bonds issued for such purposes must necessarily be void.

Counsel for appellant, in the argument of this case in the court below, placed some reliance upon the judgment of this court, in *Rogers* v. *Burlington*, 3 Wallace, 665, and *Mitchell* v. *Burlington*, 4 *ib.*, 273. But these cases are clearly authorities in favor of our position. In the first case Mr. Justice CLIFFORD, in delivering the opinion of the court, begins with the following language:

"Corporation defendants were authorized by their "charter, to borrow money *for any public purpose, when-* "*ever, in the opinion of the city council, it should be deemed* "*expedient to exercise that power.*"

The grant of power was in the broadest possible terms. It was a power to issue bonds for *any* purpose, when deemed expedient by the city council. In the case at bar the grant was simply a grant of power to borrow money, given in connection with other grants of powers necessary to be exercised by the city for the ordinary purposes of municipal government.

In the case just cited, it was contended that notwithstanding the sweeping words of the grant of power, the

bonds, which were issued to aid in building a railroad, were nevertheless void, because, as counsel urged, the grant should be so construed as to limit the exercise of the power to the issue of bonds for municipal purposes. This was substantially conceded by the majority of the court, which sustained the bonds, but it was held that a railroad was only an improved highway, and therefore might be fairly considered as one of the "public purposes," to which a city could appropriate its funds. This is the language of the court:

"Second proposition submitted is, that the defend-
"ants could not borrow money or purchase bonds in aid of
"the improvement specified in the ordinance, because such
"a work is not within the usual and ordinary objects to be
"accomplished by a municipal corporation, and conse-
"quently was not a public purpose within the meaning of
"that phrase as employed in the charter of the city. They
"admit that the construction of a railroad is a public im-
"provement, and they insist that the phrase 'public purpose'
"as employed in the charter must be limited in its signifi-
"cation to such public purposes as fall within the usual and
"ordinary sphere of municipal corporations. Undoubtedly
"there is much force in the latter suggestion, and it would
"seem that as applied to many improvements of great
"public utility, the proposition may well be conceded.
"*None of the decided cases which maintain the power of the*
"*State legislatures to authorize such material aid in the*
"*construction of railroads, decide or even intimate that*
"*the power may be exercised without limit, or be extended to*
"*a public enterprise entirely foreign to the general objects*
"*which the corporation was created to subserve.* Those
"adjudications are not obnoxious to any such charge, but
"the theory maintained is, that a railroad is nothing more
"than an improved highway, and that it is as competent
"for the legislature to authorize a municipal corporation to

" furnish material aid in the construction of a railroad " connected with the same, as to construct a highway."

Here we find the court expressly saying, that " none of " the decided cases which maintain the power of the State " legislatures to authorize such material aid in the con- " struction of railroads, decide, or even intimate, that the " power may be exercised without limit, or be extended to " a public enterprise entirely foreign to the general objects " which the corporation was created to subserve."

It cannot well be denied that aid of a private manufacturing corporation in the creation of a water power, was an " enterprise entirely foreign to the general objects " which the corporation was created to subserve."

But the minority of the court, comprising four members, could not accept even this theory. Mr. Justice FIELD, in whose opinion the Chief Justice and Mr. Justice GRIER, and Mr. Justice MILLER, concurred, said:

" I might proceed and show that the purpose for which " the bonds in this case were issued, was not within the " objects to be accomplished by the charter of incorporation; " that those objects were such as are usually contemplated " in the creation of a municipal corporation; the establish- " ment of a local government, the securing of peace, good " order, and health, within the corporate limits, and the " promotion of such measures as would conduce to the " general good of the municipality, and that the power to " borrow money was restricted to the purposes declared. " But it is unnecessary to pursue the matter further."

There is nothing in this case, nor in the subsequent one of *Mitchell* v. *Burlington*, 4 Wallace, 273, which involved a similar construction of the same charter, as applicable to building a plank road, that can furnish support to the plaintiffs in error. In both cases the bonds were voted for a public purpose, and a purpose which the majority of

the court held might fairly be deemed municipal. But the guarded language of the court excludes a case like that at bar from this category.

In view of the preceding cases, we submit, it is very clear that these bonds were issued for a purpose not authorized by the Legislature, and not municipal, and they are therefore void.

II.

EVEN IF EXPRESS AUTHORITY HAD BEEN GIVEN TO THE CITY OF OTTAWA BY THE LEGISLATURE TO ISSUE BONDS AS A DONATION TO THE OTTAWA MANUFACTURING COMPANY, SUCH ACT OF THE LEGISLATURE WOULD HAVE BEEN VOID UNDER THE CONSTITUTION OF ILLINOIS.

In the case of *Loan Association* v. *Topeka*, 20th Wallace, 655, this precise point was ruled in reference to an act of the Legislature of Kansas, authorizing in express terms the City of Topeka to issue bonds in aid of manufactories. The city availed itself of this grant of power, and this court held the act of the Legislature invalid and the bonds void; and it so held, not because of a special provision of the Constitution of Kansas, designed to prohibit such legislation, such as we shall show was contained in the Constitution of Illinois, but upon the broad ground that such a statute was in violation of those general and fundamental principles which are embodied in all our American constitutions, and are designed as safeguards against legislative invasion of the rights of private property. The question, stated in its simplest form, was whether the Legislature could authorize the levy of a tax for any purpose except a public one. In that case, as in the present, the tax was levied to aid a private manufactory, and was therefore for a private purpose.

The court said :

"We have established, we think, beyond cavil, that "there can be no lawful tax which is not laid for *a public* "*purpose*. It may not be easy to draw the line in all cases "so as to decide what is a public purpose in this sense, "and what is not. It is undoubtedly the duty of the "Legislature which imposes, or authorizes municipalities "to impose a tax, to see that is is not to be used for pur- "poses of private interest instead of public use, and the "courts can only be justified in interposing when a viola- "tion of this principle is clear and the reason for inter- "ference cogent. And in deciding whether, in the "given case, the object for which the taxes are assessed "falls upon the one side or the other of this line, they "must be governed mainly by the course and usage of "the government, the objects for which taxes have been "customarily and by long course of legislation levied, "what objects or purposes have been considered necessary "to the support and for the proper use of the govern- "ment, whether State or municipal. Whatever lawfully "pertains to this, and is sanctioned by time and the acqui- "escence of the people, may well be held to belong to "the public use, and proper for the maintenance of good "government, though this may not be the only criterion "of rightful taxation."

This decision, we submit, embodies the soundest principles of constitutional law, and must commend itself at once to every thoughtful man as a most valuable protection against legislative wrong. But we need not rely upon this alone, for we can present to the court a specific constitutional provision of Illinois, which our Supreme Court has always recognized as amounting to an express prohibition of legislative power to grant to municipal corporations the right to levy a tax for a private purpose.

The 5th section of the 9th article of the constitution

adopted in 1848, and in force until 1870, within which dates the ordinances under consideration were adopted, is as follows :

" The corporate authorities of counties, townships, " school districts, cities, towns and villages may be " vested with power to assess and collect taxes for cor- " porate purposes ; such taxes to be uniform in respect to " persons and property within the jurisdiction of the body " imposing the same."

It is evident from the first reading of the above clause that the authority here given to the legislature to vest municipal corporations with power to assess and collect taxes " for " corporate purposes," is an implied prohibition against their being vested by the legislature with power to levy and collect taxes for any other than " corporate purposes." In this sense, it has always been construed by the Supreme Court of the State.

In *Harward* v. *St. Clair Drainage Company*, 51 Ill., p. 133, the Supreme Court, after quoting the above clause from the constitution, said :

" We believe it has always been understood, that this " clause limited local or corporate taxation to local or cor- " porate purposes, and it has always been so construed " whenever its construction has come before this court.

" This case presents the question, whether it was not " also intended as a limitation upon the power of the legis- " lature to grant the right of corporate or local taxation to " any other persons than the corporate or local authori- " ties."

The court then after expressing the opinion that the clause was a limitation upon the legislature, not only in regard to the purposes of local taxation, but as to the authorities by whom the power of taxation was to be exercised, proceeds as follows :

"Our reasons for this opinion are two-fold: The clause "in question was not in the former constitution, and yet "the right of the legislature, under that constitution, to "vest in municipal corporations the power of taxation for "local or corporate purposes was constantly exercised, "and never denied or doubted.

"It is evident, then, this clause was not inserted in the "present constitution as a necessary grant of power, or to "remove a doubt as to its exis ..ce. It is, therefore, a just "inference that its purpose was to define the class of per-"sons to whom the right of taxation might be granted, "and the purpose for which it might be exercised, and "when the legislature seeks to grant it to any other than "corporate authorities, or for corporate purposes, it trans-"gresses the limits of its power.

"If the clause in question was not designed as a limita-"tion of power, no reason can be given why it was in-"serted in the constitution at all.

"Our second reason for holding it a limitation is, be-"cause of the intrinsic wisdom of the clause, when thus "construed." The court then discusses the last point.

In the case of *The People* v. *Salomon*, *ib.*, p. 48, the court use the following language:

"We have held, in *Harward* v. *The St. Clair and* "*Monroe Levee and Drainage Company*, reported *post.* "page 130, and in the case of *The People ex rel. McCagg* "v. *The Mayor, &c., of Chicago*, *ante*, p. 17, that this "clause must be construed as a limitation upon the power "of the Legislature to authorize any other than corporate "authorities to assess and collect local taxes.

"But while this provision limits the objects of local tax-"ation to corporate purposes, and the delegation of the "power of taxation to the corporate authorities of coun-"ties, townships, school districts, cities, towns and vil-

" lages, it clearly does not prevent the Legislature from " creating districts by the union of two or more towns in " the same county for any special township purpose."

In the case of *People* v. *Dupuyt*, 71 Ill., p. 653, the court said : " It has frequently been held by this court, " and must be regarded as well settled, that this clause of " the constitution is a limitation on the taxing power of the " State ; that taxation can not be imposed by a corpora- " tion, except for local or corporate purposes."

Johnson v. *Campbell*, 49 Ill., p. 317.

Harward v. *St. Clair Drain. Co.*, 51 Ill., p. 132.

Madison County v. *The People*, 58 Ill., p. 463.

We rely, therefore, not only upon the decision of this court in the Topeka case, but upon the express provision of the Illinois Constitution, as construed by the Illinois Supreme Court, that the Legislature cannot authorize a municipal corporation to levy a tax for any but corporate purposes. The State Constitution of 1870 still more carefully limits the power of taxation, but we do not cite its provisions, as it took effect after the adoption of the ordinances under which these bonds were issued.

III.

The bonds in question were not issued for a corporate purpose.

From the preceding authorities, it is evident, the bonds in question, if not issued for a corporate purpose, were void, for it need hardly be remarked that if the bonds were issued for a purpose in support of which no tax could be levied and collected, no judgment can be rendered against the city upon the bonds. This court said in the Topeka

case, *supra*, that "the right to contract must be limited by "the right to tax, and if in the given case no tax can law- "fully be levied to pay the debt, the contract itself is void "for want of authority to make it."

It may be contended, as it was in the court below, that the purpose for which these bonds were issued can be considered as corporate, and the case of *Taylor* v. *Thompson*, 42 Ill., p. 9, may be cited in support of this theory. That was a case in which the court decided, during the late war with the rebel States, that a statute authorizing counties and towns to levy and collect a bounty tax was constitutional.

But, as remarked by the learned judge, in deciding this case in the court below, the decisions in these bounty cases must be considered exceptional, and are hardly to be drawn into precedents. They were decisions made almost *ex necessitate*. The courts felt they could not cripple the power of the government to raise troops by denying to counties, cities and towns the right to offer bounties when authorized by the Legislature. The Supreme Court of Illinois, in the case of *Board of Supervisors* v. *Weider*, 64 Ills., 427, in commenting upon these cases, said: "The court "went far enough in upholding this tax." This must be the conviction of any lawyer, and no court can be expected to say, on the authority of these cases, that a tax levied to raise a donation to a private manufacturing corporation must be sustained.

We submit, it is impossible to claim, with any show of reason, that these bonds were issued for a corporate purpose. The point is covered by the Topeka case above cited from the 20th Wallace. The bonds in that case, as in this, were issued to aid a manufacturing corporation. Precisely the same considerations could be and were urged in their favor as may be urged here, namely, the general benefit conferred by such establishments upon the towns

where they are located. But this is what the court said:

"But in the case before us, in which the towns are "authorized to contribute aid by way of taxation to any "class of manufacturers, there is no difficulty in holding "that this is not such a public purpose as we have been "considering. If it be said that a benefit results to the "local public of a town by establishing manufactories, the "same may be said of any other business or pursuit which "employs capital or labor. The merchant, the mechanic, "the innkeeper, the banker, the builder, the steamboat "owner are equally promoters of the public good, and "equally deserving the aid of the citizens by forced con-"tributions.

"No line can be drawn in favor of the manufacturer "which would not open the coffers of the public treasury "to the importunities of two-thirds of the business men "of the city or town."

So also in *Bissell* v. *City of Kankakee*, 64 Ills., 251, already cited, the court held bonds issued to aid a linen manufactory void; and in *Board of Supervisors* v. *Weider*, 64 Ills., 427, the court decided against the validity of bonds issued by a county to secure the location of a State reform school. In the last case, the court said, page 432:

"It may be difficult to determine with precision what is "a 'corporate purpose' in the sense of the constitution; "but it is less difficult to decide what is not such a pur-"pose. The true doctrine is, such purposes, and such "only, as are germane to the objects of the creation of the "municipality; at least such as have a legitimate connec-"tion with those objects, and a municipal relation thereto.

"A view more liberal and extended than this might in-"volve these corporations in much embarrassment, invit-"ing them to prodigal taxation, and a lavish expenditure "of its proceeds in works more fanciful than really pro-"motive of the best interests of the municipality."

The bonds in the case at bar were an absolute donation to an individual or to a purely private corporation. The city was to have no interest in the water power to be created, nor any voice in its management. It was to be wholly private property, as much so as any other in the city; and we do not understand how it can seriously be claimed that bonds issued to Mr. Cushman or to the Ottawa Manufacturing Company, for the purpose of creating this property, to be held as their private property, were bonds issued for "corporate purposes."

There is nothing in the case of *Burlington* v. *Beasley*, 4 Otto, 312, in conflict with the views we have expressed. In that case a town, under the authority of an act of the Legislature, had issued bonds to aid in the construction of a steam grist mill. This court sustained the validity of the bonds upon the ground that grist mills are by the statute of Kansas declared to be public institutions, and subject to legislative control, and the court cite the case of *Munn* v. *Illinois*, 4 Otto, 112, as sustaining that view.

The court also says its decision upholding these bonds is in perfect harmony with the ruling in the Topeka case, the distinction being that a grist mill is a public work. This is the language of the court, (p. 314):

"Under our recent decision in *Munn* v. *Illinois*, *supra*, "p. 112, and the other cases upon kindred subjects, it "would be competent to the Legislature of Kansas to "regulate the toll to be taken at these mills. It is a rea- "sonable construction of this statute to hold that aid to "this mill is aid of a public work within its meaning, and "that the construction and equipment of a steam grist "mill was an internal improvement."

"The case of *Loan Association* v. *Topeka*, 20 Wall., 661, "will adjudge these bonds to be legal. The point is there "expressly made that bonds, when issued for a public

" purpose, a public use, which it is the right and duty of " the State government to assist, are valid. The issue we " are considering falls within this definition."

IV.

THERE IS NO QUESTION IN THIS CASE OF INNOCENT PURCHASERS OF NEGOTIABLE PAPER, FOR TWO REASONS: FIRST, THE BONDS WERE ISSUED WITHOUT STATUTORY AUTHORITY, AND FOR A PURPOSE FOR WHICH NO STATUTE AUTHORITY WOULD HAVE BEEN AVAILING, AND SECOND, THE BONDS SHOWED THIS DEFECT ON THEIR FACE.

In all the cases decided by this court in regard to municipal bonds,this principle has been stadily maintained — to wit,that there can be no question of innocent holding where there was an absence of power to issue the bonds in question. Power to issue must exist, or the bonds will be held void, no matter in whose hands they are. There can be no innocent holder of such bonds.

In the case of *Township of East Oakland* v. *Skinner*, 4 Otto, 258, the court said:

" We have held that there can be no *bona fide* holding " where the statute did not in law authorize the issue of " the bonds. The objection in such case goes to the point " of power. There is an entire want of jurisdiction over " the subject. It is not the case of an informality, an ir- " regularity, fraud, or excess of authority in an authorized " agent. Where there is a total want of authority to issue " the bonds, there can be no such thing as a *bona fide* " holding."

In *Town of South Ottawa* v. *Perkins*, 4 Otto, 269, the same rule is announced in the following language :

" Not only the courts, but individuals, are bound to know

" the law, and cannot be permitted to plead ignorance of it. " The holder of the bonds in question can claim no indulgence " on that score, and can take no advantage from the allega- " tion that he is a *bona fide* purchaser without notice. He " would, it is true, be precluded from doing so on another " ground, namely, the want of any legislative authority in " fact in the town to issue the bonds in question. Want of " such authority is a fatal objection to their validity, no " matter under what circumstances the holder may have " obtained them."

We also quote the following from *Marsh* v. *Fulton County*, 10 Wallace, 683:

" The authority to contract must exist before any pro- " tection as an innocent purchaser can be claimed by the " holder. This is the law even as respects commercial " paper alleged to have been issued under a delegated au- " thority, and is stated in the case of *Floyd Acceptances.* " In speaking of notes and bills issued or accepted by an " agent as being under a general or special power, the " court says: 'In each case the person dealing with the " agent, knowing that he acts only by virtue of a dele- " gated power, must, at his peril, see that the paper on " which he relies comes within the power under which " the agent acts. And this applies to every person who " takes the paper afterwards; for it is to be kept in mind " that the protection which commercial usage throws " around negotiable paper cannot be used to establish the " authority by which it was originally issued.' "

Secondly, these bonds state on their face as authority for their issue the ordinances under which they were issued, and which show the object of their issue. They give the title of each ordinance, and the date of its passage. This is notice to all purchasers.

In the case of *McClure* v. *Township of Oxford*, 4 Otto, 432, the court said:

"Every dealer in municipal bonds which, upon their "face, refer to the statute under which they were issued, "is bound to take notice of the statute and all its require- "ments."

In the same case the court say, page 433:

"This suit was brought upon coupons detached from "the bonds purchased by the plaintiff in error before ma- "turity, but upon their face they refer to the bonds, and "purport to be for the semi-annual interest accruing there- "on. This puts the purchaser upon inquiry for the bonds, "and charges him with notice of all they contain."

In the case of *Haishman* v. *Bates County*, 2 Otto, 575, the court held certain municipal bonds void in the hands of innocent holders, and said they were put upon inquiry by the recitals of the bonds.

On the foregoing points we can submit this case with entire confidence. The argument is plain and simple, but conclusive.

The bonds were issued for a private purpose.

The City Council had no power to issue them for such purpose, and the legislature could give it none. They are therefore void, no matter in whose hands they may be found.

LAWRENCE, CAMPBELL & LAWRENCE,
CHARLES BLANCHARD,
Attorneys for Defendant in Error.

C. B. LAWRENCE,
Of Counsel.

We annex hereto a copy of the Opinion of the Court below in this case, published in the Chicago Legal News of November 30, 1878.

The opinion follows the "addenda" & is attached to the cover

ADDENDA.

In the case of *Law* v. *The People*, Chicago Legal News, Volume 10, p. 171, the Supreme Court of Illinois, use the following language, in regard to what is meant by the phrase " corporate purposes."

We did not discover the opinion in time to incorporate it in the foregoing argument.

They say:

" In what manner shall we ascertain whether the tax is " for a corporate purpose? Manifestly by turning to that " portion of the charter which confers the power to per- " form duties and exercise powers. If the tax is neces- " sary to carry out any of these powers, or to perform " any of these duties, then it is for a corporate purpose. " If the appropriation is to enable the city to discharge " any of these duties, or to exercise any of these powers, " then it is legally made. If the appropriation is made " or the tax levied for some other or different purpose, " then the appropriation is illegal, and there is no power " to levy such a tax.

" The levy of a tax to raise a fund to entertain official " visitors is not one of the powers granted by the sixty- " second section of the charter, and as its exercise is re- " pugnant to the express powers granted, the section of " the old charter under consideration cannot be held to be " a part of the present charter. Municipal corporations " can only exercise such powers as are conferred upon " them by the General Assembly; and the grant of power " must be express or from implication, from the necessity " of its exercise to carry out some power that has been " expressly granted. The power contended for is not " granted, nor is its exercise essential to carry out any " other power. We are of the opinion that this section, " in spirit, conflicts with the provisions of the present " charter."

L. C. & B.